UNITED STATES REPORTS

VOLUME 430

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1976

OPINIONS OF FEBRUARY 23 THROUGH (IN PART) APRIL 27, 1977
ORDERS OF FEBRUARY 23 THROUGH APRIL 25, 1977

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1979

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Stock Number 028-001-00399-1

Erratum

107 U. S. 230–231, the first three sentences of the quotation from *Hartung* v. *People*, 22 N. Y. 95, and the last sentence (following the ellipsis) should read as follows:

"It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offences of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, *except according to a law prescribed for his government by the sovereign authority, before the imputed offence was committed, and which existed as a law at that time*. . . . No State shall pass any *ex post facto* law, is the mandate of the Constitution of the United States." (Emphasis added.)

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v. 430

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.*
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Marshal.
BETTY J. CLOWERS, Acting Librarian.

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*The Honorable Wade H. McCree, Jr., of Michigan, was nominated by President Carter to be Solicitor General on February 16, 1977; the nomination was confirmed by the Senate on March 4, 1977; and he entered on duty March 29, 1977. He was presented to the Court on April 4, 1977 (see *post*, p. v). During the vacancy that had existed since the resignation of Solicitor General Bork effective January 20, 1977, Deputy Solicitor General Friedman was Acting Solicitor General. (See 429 U. S. IV n. 3.)

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

PRESENTATION OF SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 4, 1977

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

Mr. Deputy Solicitor General Friedman presented the Honorable Wade H. McCree, Jr., of Michigan, Solicitor General of the United States.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the Government before this Court. Your commission will be duly recorded by the Clerk.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1976

PIPER ET AL. *v.* CHRIS-CRAFT INDUSTRIES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75–353. Argued October 6, 1976—Decided February 23, 1977*

Respondent Chris-Craft Industries was the unsuccessful tender offeror in a contest for the control of a corporation. During the course of the takeover contest, Chris-Craft brought suit for damages and injunctive relief against the management of the target corporation, its investment adviser, and Bangor Punta Corp., the successful competitor, alleging, *inter alia*, violations of § 14 (e) and other provisions of the Securities Exchange Act of 1934, and Rule 10b–6 of the Securities and Exchange Commission. Section 14 (e) makes unlawful "any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . or any solicitation of security holders in opposition to or in favor of any such offer . . . ." Rule 10b–6 prohibits issuers whose stock is in the process of distribution from market tampering by purchasing stock or stock rights until the distribution has been completed. After protracted litigation, the Court of Appeals ultimately held that Chris-Craft had standing to sue for damages under § 14 (e) and Rule 10b–6 and that a claim for damages had been established. The court stated that it would not infer from the silence of the statute that Congress intended to deny a federal remedy as a "means of furthering the general

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*Together with No. 75–354, *First Boston Corp.* v. *Chris-Craft Industries, Inc.*, and No. 75–355, *Bangor Punta Corp. et al.* v. *Chris-Craft Industries, Inc.*, also on certiorari to the same court.

objective of § 14 (e). . . ." On the merits the court found violations of § 14 (e) by all the defendants and violations of Rule 10b–6 by the successful competitor. The court then remanded for a determination of the amount of damages and instructed the District Court to enjoin the successful competitor for at least five years from voting the target company's shares acquired through violation of § 14 (e) and Rule 10b–6. *Held:*

1. A tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under § 14 (e); hence, the Court of Appeals erred in holding that Chris-Craft, as a defeated tender offeror, had an implied cause of action for damages under that provision. Pp. 24–42.

(a) The legislative history shows that the sole purpose of § 14 (e) was the protection of investors who are confronted with a tender offer. Congress was intent on regulating takeover bidders, who had previously operated covertly, in order to protect shareholders of target companies; tender offerors, the class regulated by the statute, were not the intended beneficiaries of the legislation. Pp. 26–37.

(b) The creation of an implied cause of action for damages by judicial interpretation, such as is urged by Chris-Craft, is not necessary to effectuate Congress' objectives in enacting § 14 (e). This conclusion is confirmed by the four factors identified in *Cort* v. *Ash*, 422 U. S. 66, as "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one: (i) Chris-Craft, a member of the class whose activities Congress intended to regulate for the benefit of target shareholders, was not "'one of the class for whose *especial* benefit [§ 14 (e)] was enacted . . .'"; (ii) although nothing in the legislative history manifests an intent to deny a damages remedy to tender offerors, there is no material showing an intention to create such a remedy, and the pervasive legislative history negates any claim that the statute was intended to provide tender offerors with additional weapons in contests for control; (iii) it is not consistent with the underlying legislative purpose to imply a damages remedy for the tender offeror in a statute especially designed to protect shareholders of target corporations, particularly where the damages award (here $36 million to Chris-Craft) favors the tender offeror, not the "injured" shareholders of the target; and (iv) the cause of action by a tender offeror is one appropriately "relegated to state law," to the extent that the offeror seeks damages for loss of an opportunity to control a corporation. Pp. 37–41.

2. In the context of this case, Chris-Craft has no standing to sue for damages on account of the asserted Rule 10b–6 violations by the

successful competitor, since Chris-Craft's complaint is not that the price paid for the target company's shares was influenced by the Rule 10b–6 violations, but that the opportunity to gain control of the target company was lost by virtue of those violations. Thus, Chris-Craft's complaint does not implicate the concerns of Rule 10b–6, which is aimed at maintaining an orderly market for the distribution of securities free from manipulative influences. Pp. 42–46.

3. The Court of Appeals erred under the circumstances presented here in awarding Chris-Craft injunctive relief. The case was tried in the District Court exclusively as a suit for damages after Chris-Craft expressly waived any claim to injunctive relief. Under these circumstances, this Court's holding that Chris-Craft has no cause of action for damages under either § 14 (e) or Rule 10b–6 renders the injunction granted by the District Court inappropriate, premised as it was upon the impermissible award of damages. Pp. 47–48.

516 F. 2d 172, reversed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 48. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 53.

Paul G. Pennoyer, Jr., argued the cause for petitioners in No. 75–353. With him on the briefs was *Zachary Shimer*. *David W. Peck* argued the cause for petitioner in No. 75–354. With him on the briefs were *Arthur H. Dean, John F. Arning, John L. Warden, Charles W. Sullivan*, and *Louis Loss*. *Lloyd N. Cutler* argued the cause for petitioners in No. 75–355. With him on the briefs were *Manuel F. Cohen, Louis R. Cohen, Stephen F. Black, William T. Lake, Michael S. Helfer, William J. Kolasky, Jr., James V. Ryan, Roger L. Waldman, Charles Alan Wright, Dudley C. Phillips*, and *John J. Martin*.

Arthur L. Liman argued the cause for respondent in all three cases. With him on the brief were *Simon H. Rifkind, Stuart Robinowitz*, and *Jack C. Auspitz*.†

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†*Harvey L. Pitt* and *David Ferber* filed a brief for the Securities and Exchange Commission as *amicus curiae* urging affirmance in all cases.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these cases, 425 U. S. 910 (1976), to consider, among other issues, whether an unsuccessful tender offeror in a contest for control of a corporation has an implied cause of action for damages under § 14 (e) of the Securities Exchange Act of 1934, as added by § 3 of the Williams Act of 1968, 82 Stat. 457, 15 U. S. C. § 78n (e), or under Securities and Exchange Commission (SEC) Rule 10b–6, 17 CFR § 240.10b–6 (1976), based on alleged antifraud violations by the successful competitor, its investment adviser, and individuals constituting the management of the target corporation.

I

Background

The factual background of this complex contest for control, including the protracted litigation culminating in the cases now before us, is essential to a full understanding of the contending parties' claims.

The three petitions present questions of first impression, arising out of a "sophisticated and hard fought contest" for control of Piper Aircraft Corp., a Pennsylvania-based manufacturer of light aircraft. Piper's management consisted principally of members of the Piper family, who owned 31% of Piper's outstanding stock. Chris-Craft Industries, Inc., a diversified manufacturer of recreational products, attempted to secure voting control of Piper through cash and exchange tender offers for Piper common stock. Chris-Craft's takeover attempt failed, and Bangor Punta Corp. (Bangor or Bangor Punta), with the support of the Piper family, obtained control of Piper in September 1969. Chris-Craft brought suit under § 14 (e) of the Securities Exchange Act of 1934 and Rule 10b–6 alleging that Bangor Punta achieved control of the target corporation as a result of violations of the federal securities laws by the Piper family, Bangor Punta, and Bangor Punta's

underwriter, First Boston Corp., who together had successfully repelled Chris-Craft's takeover attempt.

The struggle for control of Piper began in December 1968. At that time, Chris-Craft began making cash purchases of Piper common stock. By January 22, 1969, Chris-Craft had acquired 203,700 shares, or approximately 13% of Piper's 1,644,790 outstanding shares. On the next day, following unsuccessful preliminary overtures to Piper by Chris-Craft's president, Herbert Siegel, Chris-Craft publicly announced a cash tender offer for up to 300,000 Piper shares [1] at $65 per share, which was approximately $12 above the then-current market price. Responding promptly to Chris-Craft's bid, Piper's management met on the same day with the company's investment banker, First Boston, and other advisers. On January 24, the Piper family decided to oppose Chris-Craft's tender offer. As part of its resistance to Chris-Craft's takeover campaign, Piper management sent several letters to the company's stockholders during January 25–27, arguing against acceptance of Chris-Craft's offer. On January 27, a letter to shareholders from W. T. Piper, Jr., president of the company, stated that the Piper Board "has carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders."

In addition to communicating with shareholders, Piper entered into an agreement with Grumman Aircraft Corp. on January 29, whereby Grumman agreed to purchase 300,000 authorized but unissued Piper shares at $65 per share. The agreement increased the amount of stock necessary for Chris-Craft to secure control and thus rendered Piper less vulnerable to Chris-Craft's attack. A Piper press release and letter to shareholders announced the Grumman transaction but failed to state either that Grumman had a "put" or option to sell the shares back to Piper at cost, plus interest, or that

[1] The cash tender offer indicated that Chris-Craft reserved the right to purchase shares in excess of the 300,000 specified amount.

Piper was required to maintain the proceeds of the transaction in a separate fund free from liens.

Despite Piper's opposition, Chris-Craft succeeded in acquiring 304,606 shares by the time its cash tender offer expired on February 3. To obtain the additional 17% of Piper stock needed for control, Chris-Craft decided to make an exchange offer of Chris-Craft securities for Piper stock. Although Chris-Craft filed a registration statement and preliminary prospectus with the SEC in late February 1969, the exchange offer did not go into effect until May 15, 1969.

In the meantime, Chris-Craft made cash purchases of Piper stock on the open market until Mr. Siegel, the company's president, was expressly warned by SEC officials that such purchases, when made during the pendency of an exchange offer, violated SEC Rule 10b–6.[2] At Mr. Siegel's direction, Chris-Craft immediately complied with the SEC's directive and canceled all outstanding orders for purchases of Piper stock.

While Chris-Craft's exchange offer was in registration, Piper in March 1969 terminated the agreement with Grum-

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[2] Rule 10b–6 provides in pertinent part:

"(a) It shall constitute a 'manipulative or deceptive device or contrivance' as used in section 10 (b) of the act for any person,

"(1) Who is an underwriter or prospective underwriter in a particular distribution of securities, or

"(2) Who is the issuer or other person on whose behalf such a distribution is being made, or

"(3) Who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution."

man and entered into negotiations with Bangor Punta. Bangor had initially been contacted by First Boston about the possibility of a Piper takeover in the wake of Chris-Craft's initial cash tender offer in January. With Grumman out of the picture, the Piper family agreed on May 8, 1969, to exchange their 31% stockholdings in Piper for Bangor Punta securities. Bangor also agreed to use its best efforts to achieve control of Piper by means of an exchange offer of Bangor securities for Piper common stock. A press release issued the same day announced the terms of the agreement, including a provision that the forthcoming exchange offer would involve Bangor securities to be valued, in the judgment of First Boston, "at not less than $80 per Piper share." [3]

While awaiting the effective date of its exchange offer, Bangor in mid-May 1969 purchased 120,200 shares of Piper stock in privately negotiated, off-exchange transactions from three large institutional investors. All three purchases were made after the SEC's issuance of a release on May 5 announcing proposed Rule 10b–13, a provision which, upon becoming effective in November 1969, would expressly prohibit a tender offeror from making purchases of the target company's stock during the pendency of an exchange offer. The SEC release stated that the proposed rule was "in effect, a codification of existing interpretations under Rule 10b–6," [4] the provision invoked by SEC officials against Mr. Siegel of Chris-Craft a month earlier. Bangor officials, although aware of the release at the time of the three off-exchange pur-

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[3] Less than three weeks later, the SEC brought an action in Federal District Court charging that the Bangor press release violated "gun-jumping" provisions, 15 U. S. C. § 77e (c), and Rule 135, 17 CFR § 230.135 (1975), by stating a specific dollar valuation for unregistered securities. Without admitting any of the allegations, Bangor and Piper consented to a permanent injunction against similar releases before the effective date of Bangor's registration statement.

[4] SEC Release No. 8595, May 5, 1969, CCH Fed. Sec. L. Rep. ¶ 77,706, p. 83,617.

chases, made no attempt to secure an exemption for the transactions from the SEC, as provided by Rule 10b–6 (f). The SEC, however, took no action concerning these purchases as it had with respect to Chris-Craft's open-market transactions.

With these three block purchases, amounting to 7% of Piper stock, Bangor Punta in mid-May took the lead in the takeover contest. The contest then centered upon the competing exchange offers. Chris-Craft's first exchange offer, which began in mid-May 1969, failed to produce tenders of the specified minimum number of Piper shares (80,000). Meanwhile, Bangor Punta's exchange offer, which had been announced on May 8, became effective on July 18. The registration materials which Bangor filed with the SEC in connection with the exchange offer included financial statements, reviewed by First Boston, representing that one of Bangor's subsidiaries, the Bangor & Aroostock Railroad (BAR), had a value of $18.4 million. This valuation was based upon a 1965 appraisal by investment bankers after a proposed sale of the BAR failed to materialize. The financial statements did not indicate that Bangor was considering the sale of the BAR or that an offer to purchase the railroad for $5 million had been received.[5]

In the final phase of the see-saw of competing offers, Chris-Craft modified the terms of its previously unsuccessful exchange offer to make it more attractive. The revised offer succeeded in attracting 112,089 additional Piper shares, while Bangor's exchange offer, which terminated on July 29, resulted in the tendering of 110,802 shares. By August 4, 1969, at the conclusion of both offers, Bangor Punta owned a total of 44.5%, while Chris-Craft owned 40.6% of Piper stock. The remainder of Piper stock, 14.9%, remained in the hands of the public.

[5] Shortly after the contest for control was completed, Bangor entered into an agreement to sell the BAR for $5 million, thereby resulting in a $13.8 million book loss.

After completion of their respective exchange offers, both companies renewed market purchases of Piper stock,[6] but Chris-Craft, after purchasing 29,200 shares for cash in mid-August, withdrew from competition.[7] Bangor Punta continued making cash purchases until September 5, by which time it had acquired a majority interest in Piper. The final tally in the nine-month takeover battle showed that Bangor Punta held over 50% and Chris-Craft held 42% of Piper stock.

II

Before either side had achieved control, the contest moved from the marketplace to the courts. Then began more than seven years of complex litigation growing out of the contest for control of Piper Aircraft.

A

Chris-Craft's Initial Suit
May 22, 1969

On May 22, 1969, Chris-Craft filed suit seeking both damages and injunctive relief in the United States District Court for the Southern District of New York. Chris-Craft alleged that Bangor's block purchases of 120,200 Piper shares in mid-May violated Rule 10b–6 and that Bangor's May 8 press release, announcing an $80 valuation of Bangor securities to be offered in the forthcoming exchange offer, violated SEC "gun-jumping" provisions, 15 U. S. C. § 77e (c), and

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[6] Since the respective distributions of securities pursuant to the exchange offers had been completed at this point, the legality of these market purchases was unchallenged.

[7] The reason for Chris-Craft's withdrawal from the contest is a matter in dispute. According to one view, espoused by Judge Mansfield at one stage in the ensuing litigation, Chris-Craft had "'shot its bolt' in the financial sense by early February 1969 . . . . It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer." 480 F. 2d 341, 402 (CA2 1973).

SEC Rule 135, 17 CFR § 230.135 (1976). Chris-Craft sought to enjoin Bangor from voting the Piper shares purchased in violation of Rule 10b–6 and from accepting any shares tendered by Piper stockholders pursuant to the exchange offer.

B

District Court Decision on Preliminary Injunction August 19, 1969

On July 22, 1969, Chris-Craft moved for a preliminary injunction against Bangor. In an opinion filed August 19, 1969, United States District Judge Charles Tenney denied relief. Judge Tenney concluded, first, that the May 8 press release had not violated the gun-jumping provisions, and, second, that Bangor's block purchases of Piper stock were not inconsistent with Rule 10b–6.

> "Bangor Punta's cash purchases . . . , effected *neither on the Exchange nor from or through a broker or dealer*, were obviously not designed to place market pressures on the distribution price of Piper, so as to create an artificially high price for this security." 303 F. Supp. 191, 198. (Emphasis supplied.) [8]

Judge Tenney, accordingly, concluded that neither irreparable injury nor likelihood of probable success on the merits had been established, particularly since the contest for control was still open.

> "[B]oth the Chris-Craft and Bangor Punta exchange offers have expired. Neither party has gained control of Piper, and both are still in a position to do so." *Id.*, at 199.

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[8] Chris-Craft's earlier purchases, which were challenged by the SEC on the basis of Rule 10b–6, were open-market purchases. Mr. Siegel promptly stopped the purchases at the SEC's behest. *Supra*, at 6.

C

Court of Appeals' Decision on Preliminary Injunction April 28, 1970

On appeal, the Court of Appeals for the Second Circuit, sitting en banc, affirmed Judge Tenney's denial of injunctive relief. 426 F. 2d 569 (1970). In an opinion by Judge Waterman, the court held that Bangor had properly been allowed to continue soliciting Piper stock.

> "Chris-Craft was free [at the time of the District Court's decision] to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition . . . that Chris-Craft was placed at any real disadvantage." *Id.*, at 573.

The court concluded, however, that Bangor had violated SEC "gun-jumping" provisions and Rule 10b–6, unless the three block purchases fell within an established exemption to the Rule.[9]

Chief Judge Lumbard in dissent agreed that injunctive relief was unwarranted, but also accepted the District Court's determination that Bangor had not violated the securities laws.[10] *Id.*, at 579.

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[9] Rule 10b–6 is set out in part at n. 2, *supra*. The Rule, among other things, prohibits an issuer or underwriter from purchasing any security which is the subject of a distribution. Eleven separate exemptions are created, however, including "unsolicited privately negotiated purchases [of stock] . . . effected neither on a securities exchange nor from or through a broker or dealer . . . ." 17 CFR § 240.10b–6 (a)(3)(ii) (1975).

[10] Two other judges wrote separately. Judge Moore expressed doubts as to the majority's legal conclusions concerning Bangor's alleged violations. He stated that he would not pass on any issue other than the propriety of the denial of injunctive relief. Judge Anderson, while concurring, expressed separate views concerning the materiality of the $80 valuation estimate in the May 8 press release.

The Court of Appeals remanded the case for further proceedings, so that Bangor, among other things, could attempt to establish that its block purchases fell within an exemption to Rule 10b–6.

D

District Court Decision on SEC Injunction
August 25, 1971

While Chris-Craft's private suit was pending, the SEC sought an injunction against Bangor on account of the BAR omission in Bangor's registration statement. The SEC sought both an offer of rescission to Piper shareholders who accepted Bangor's exchange offer and an injunction against Bangor from violating the Securities Act of 1933 and the 1934 Act.

In an opinion by Judge Pollack, the District Court concluded that Bangor's registration statement was unintentionally misleading by virtue of the failure to disclose the fact that an offer had been received for the sale of the BAR. Accordingly, the court required Bangor to offer rescission to tendering Piper shareholders; however, the District Court refused to grant an injunction against future violations of the securities laws on the ground that the SEC had failed to establish that Bangor and its officials had a "propensity or natural inclination to violate the securities law." *SEC* v. *Bangor Punta Corp.*, 331 F. Supp. 1154, 1163 (1971).

E

District Court Decision on Liability
December 10, 1971

On remand from the Court of Appeals, Chris-Craft's private action also came before Judge Pollack. Although its second amended complaint, which added a claim based on the BAR omission, sought both damages and injunctive relief, Chris-Craft at a pretrial hearing expressly abandoned its

prayer for equitable relief; the case was thereafter treated solely as an action for damages. 337 F. Supp. 1128, 1136 n. 8.

Following trial before the District Court without a jury, Judge Pollack in December 1971 dismissed Chris-Craft's complaint against all defendants. In an exhaustive opinion, he concluded that Chris-Craft had standing to seek damages for Bangor's Rule 10b–6 violations, 337 F. Supp., at 1133, but found it unnecessary to decide whether § 14 (e) could be invoked by one competitor for corporate control against another. 337 F. Supp., at 1134.[11]

On the merits, the District Court held that the Piper communications characterizing Chris-Craft's cash tender offer as "inadequate" were not misleading. The court concluded that the "more rational" view was that the statements referred to factors other than price, such as Piper's views as to the quality of Chris-Craft's management. *Id.*, at 1135. The court also rejected Chris-Craft's contention that it had been injured by the omission in the Grumman press release concerning the "put" or option provision in the agreement. The District Court concluded that Piper's complete description of the provision in a listing application with the New York Stock Exchange, coupled with Chris-Craft's major acquisitions of Piper stock after learning of the "put," undermined Chris-Craft's claim that it was misled or otherwise injured by the announcement of the Grumman transaction. *Ibid.*

With respect to the May 8 press release, which the Court of Appeals had held violative of the "gun-jumping" rules, the District Court held that the release, although technically a violation, was not false or misleading. Moreover, Chris-Craft had failed to show that it was injured or disadvantaged by the release in its efforts to acquire Piper stock. *Id.*, at 1137.

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[11] Judge Pollack avoided the § 14 (e) issue by ruling against Chris-Craft on the merits of its antifraud claims under Rule 10b–5, with respect to which Chris-Craft's standing was assumed. 337 F. Supp., at 1134.

As to the claim of a misleading valuation of the BAR, Judge Pollack held that Chris-Craft failed to show either scienter or causation as required in a damages action under the 1934 Act's antifraud provisions. Scienter was not established, the court concluded, since the BAR omission was "mere negligent omission or misstatement of fact." *Id.*, at 1140. As to causation, the District Court specifically distinguished this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), which established a presumption of causation in a § 14 (a) suit by minority shareholders challenging misleading proxy materials. The omission in the proxy statement in that case, the District Court reasoned, directly affected the shareholders on whose behalf the suit was brought:

> "It was in that particular context that the Supreme Court deemed sufficient a set of facts under which shareholders *could* be misled. This does not aid Chris-Craft as it is seeking to recover because of the effect which a misstatement allegedly had on third parties." 337 F. Supp., at 1139. (Emphasis in original.) (Footnote omitted.)

Given the differences between the instant case and *Mills*, the District Court went on to hold that proof of actual causation was required:

> "There is no proof that a single exchanging Piper shareholder would have refrained from the exchange *and* taken an offer for his shares from Chris-Craft instead of that from Bangor Punta. In a damage suit, as distinct from one for equitable relief, such proof is essential to sustain a 10b–5 claim." *Ibid.* (Emphasis in original.)

On Chris-Craft's Rule 10b–6 claim, Judge Pollack held that, although the block purchases did not fall within any exemption to the Rule, Chris-Craft had no right to recovery:

> "Even granting that the block purchases resulted arith-

metically in Bangor Punta's achievement of control, there is no basis for concluding that, absent Bangor Punta's acquisition of these blocks, Chris-Craft would have achieved its goal of control." *Id.*, at 1142.

Based on its findings with respect to Piper and Bangor Punta, the District Court also held in favor of First Boston; the court specifically exonerated the firm of having "committed, or engaged in any course of conduct which operated as a fraud or deceit upon Chris-Craft or the public shareholders of Piper." *Id.*, at 1145.

F

Court of Appeals Decision on Liability
March 16, 1973

Chris-Craft appealed, and the SEC sought review of the District Court's denial of injunctive relief against Bangor Punta. In the Court of Appeals, each member of the panel wrote separately. All three members of the panel agreed that Chris-Craft had standing to sue for damages under § 14 (e) and that a claim for damages had been established. However, Judges Gurfein and Mansfield, over Judge Timbers' dissent, sustained the District Court's denial of an injunction against Bangor.

Court of Appeals Majority Opinion

The Court of Appeals directly answered the question concerning Chris-Craft's standing under § 14 (e), which the District Court had not decided.[12] The Court of Appeals based its holding "on the statute itself [§ 14 (e)] and such decisional law as there is that has touched on the question." 480 F. 2d 341, 358. The opinion noted that the Second

[12] Judge Pollack "assumed" that Chris-Craft had standing under Rule 10b–5, but the Court of Appeals expressly avoided passing on that issue, since it determined that Chris-Craft had standing under § 14 (e).

Circuit had on four occasions [12] addressed the issue whether a private cause of action might be implied under § 14 (e). Although acknowledging that no case represented a square holding in this respect, the court interpreted the cases to intimate "that such an implied right of action would be reasonable." 480 F. 2d, at 360. The court then noted that Chris-Craft could likely state a common-law tort claim in state court for "interference with a 'prospective advantage.'" *Ibid.*

> "We will not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act." *Id.*, at 360–361.

With respect to the legislative history of § 14 (e), the Court of Appeals expressly acknowledged that the focus of congressional concern was the protection of public shareholders. Given this purpose, the court concluded:

> "We can conceive of no more effective means of furthering the general objective of § 14 (e) than to grant a victim of violations of the statute standing to sue for damages. . . . Particularly in light of the enforcement rationale of [*J. I. Case Co.* v.] *Borak*, [377 U. S. 426 (1964),] we believe it is both necessary and appropriate that [Chris-Craft] should be granted standing to sue for damages." 480 F. 2d, at 361.

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[12] *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937 (1969) (suit by a target corporation against a tender offeror for injunctive relief); *Butler Aviation Int'l, Inc.* v. *Comprehensive Designers, Inc.*, 425 F. 2d 842 (1970) (suit for a preliminary injunction by a target corporation against a tender offeror); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787 (1969) (action for an injunction under § 10 (b) by a tender offeror against the target corporation); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963 (1969), cert. denied, 399 U. S. 909 (1970) (action under § 10 (b) by a tender offeror against the target corporation).

The court next reviewed the alleged § 14 (e) violations for which Chris-Craft sought damages. In contrast to the District Court's conclusions, the Court of Appeals held that Piper's description of the Chris-Craft offer as "inadequate" and the failure to disclose the "put" provision in the Grumman agreement constituted actionable violations of § 14 (e). 480 F. 2d, at 364–365. As to Bangor Punta, the Court of Appeals agreed with Judge Pollack's determination that Chris-Craft had not been injured by the "gun-jumping" press release of May 8; on the other hand, the court held that the BAR omission in Bangor's registration statement was actionable. The Court of Appeals expressly rejected Judge Pollack's conclusion that the registration statement was "unintentionally in error." On the contrary, the Court of Appeals held that Bangor Punta's officers "showed reckless disregard" in failing to disclose the BAR negotiations, although the court conceded that the officers were not shown to have had an "intent to defraud." *Id.*, at 369. First Boston was likewise held culpable because its certification of the registration statement "amounted to an almost complete abdication of its responsibility [as an underwriter] . . . ." *Id.*, at 373.

The Court of Appeals also disagreed with the District Court's analysis of causation. Although agreeing that Chris-Craft failed to show that it would have won the takeover battle,[14] the court relied upon *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), as establishing a presumption of reliance

[14] The District Court had looked to whether Chris-Craft would have succeeded in securing control even if Bangor had abided by the securities laws. In its analysis of causation, the Court of Appeals expressly agreed that Chris-Craft "failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations . . ." of Bangor and First Boston. 480 F. 2d, at 373. Nonetheless, causation was found. See generally Note, Chris-Craft: The Uncertain Evolution of Section 14 (e), 76 Colum. L. Rev. 634, 650–658 (1976).

and causation applicable to Chris-Craft. Under *Mills*, so the court held, "we must presume that [Bangor's] offer was not so appealing, considering the BAR loss, as to have attracted any takers." 480 F. 2d, at 375.

> "Since [Bangor] eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown." *Ibid.*

In addition to the § 14 (e) claim, the Court of Appeals held that Chris-Craft could recover damages for Bangor's Rule 10b–6 violations; the three block purchases had a "presumptively . . . stimulating effect . . . which misled the public." 480 F. 2d, at 378. Since those purchases amounted to 7% of Piper stock, "[e]ven arithmetically, it is apparent that the block purchases [by Bangor Punta] . . . were essential to achieve control." *Id.*, at 379.

The Court of Appeals then remanded with directions to the District Court to award damages in the amount of "the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position. . . ." *Id.*, at 380. Damages were to be awarded against all defendants jointly and severally. In addition, without discussing Chris-Craft's abandonment of its claim for equitable relief, the court instructed the District Court to enjoin Bangor for a period of at least five years from voting the Piper shares acquired through the exchange offer and in violation of Rule 10b–6. *Ibid.*

Finally, Judge Timbers, writing in dissent on this issue, disagreed with the conclusion of Judges Mansfield and Gurfein that the SEC request for an injunction against future violations by Bangor Punta had properly been refused. In Judge Timbers' view, the District Court employed an im-

proper legal standard in denying the SEC injunctive relief against Bangor.

Judge Gurfein's Concurring Opinion

Judge Gurfein concurred "generally" in Judge Timbers' opinion for the court. On the issue of standing, Judge Gurfein agreed with the District Court's approach in considering the matter as one of "causation before considering the question of standing." 480 F. 2d, at 393. Under Judge Gurfein's approach, Chris-Craft had standing because Bangor's acquisitions of Piper shares were necessary for control. As to scienter, Judge Gurfein was of the view that "mere negligence" would not suffice but that " 'recklessness that is equivalent to wilful fraud' is required . . . ." *Ibid.* (Citation omitted.)

Judge Gurfein disagreed, however, with Judge Timbers' analysis of the alleged Rule 10b–6 violations. He refused to indulge the presumption of "stimulating effect" embraced by Judge Timbers and concluded rather that because "the [illegal] block purchases were necessary for control causation was established. . . ." 480 F. 2d, at 393.

With respect to the SEC action against Bangor Punta, Judge Gurfein, writing for himself and Judge Mansfield, upheld the District Court's refusal to grant a permanent injunction. Applying the "abuse of discretion" standard, Judge Gurfein concluded that "the matter is not so clear that we should substitute our judgment for the judgment of the experienced trial Judge below who sat as a chancellor in equity." *Ibid.*

Judge Mansfield's Concurring and Dissenting Opinion

Judge Mansfield concurred in the "results" reached by Judge Timbers, except with respect to the Piper family's liability. Judge Mansfield agreed that the Piper communications violated § 14 (e), but concluded that Chris-Craft had failed to prove damages resulting from those infractions.

Applying the principles of *Mills* v. *Electric Auto-Lite Co.*, *supra*, Judge Mansfield stated:

> "[Chris-Craft] must show that it suffered some resulting loss. This it has failed to do." 480 F. 2d, at 401.

On the other issues addressed by the majority opinion, Judge Mansfield concluded that Chris-Craft's standing under § 14 (e) rested solely on the policy of vigorous enforcement of the antifraud provisions. 480 F. 2d, at 396. As to scienter, Judge Mansfield concluded that intent to defraud had not been shown. He formulated instead the following test of scienter:

> "In short, the *scienter* requirement would be met if the corporate officer (1) knew the essential facts and failed to disclose them, or (2) failed or refused, after being put on notice of a possible material failure in disclosure, to apprise himself of the facts under circumstances where he could reasonably have ascertained and disclosed them without any extraordinary effort." *Id.*, at 398.

He concluded that the actions complained of satisfied this standard.

Like Judge Gurfein, Judge Mansfield declined to indulge the presumption that Bangor's Rule 10b–6 violations actually operated to make its exchange offer deceptively attractive; he concurred solely on the ground that where a party achieves control through violations of the securities laws, the party is liable as a matter of law to an injured competitor.[15]

G

District Court Opinion on Relief November 6, 1974

Pursuant to the remand, Judge Pollack took evidence on damages. Although concluding that the Court of Appeals'

[15] Following the Court of Appeals' decision, petitions for review were filed in this Court by First Boston, Bangor Punta, and the Piper defendants. Certiorari was denied. 414 U. S. 910 (1973).

mandate required the use of "hypothetical figures," he determined that Chris-Craft's damages were to be measured by comparing the value of its Piper holdings prior and subsequent to Bangor's achieving control. 384 F. Supp. 507, 512 (1974). Employing this method, he concluded on the basis of expert testimony that the fair market value of Piper stock as of the day Bangor achieved control was $48 per share. *Id.*, at 517. After ascertaining that the value of Chris-Craft's takeover opportunity amounted to 5% of the fair market value of the stock, or $2.40 per share, *id.*, at 523, the District Court awarded to Chris-Craft, based on its holdings of 697,495 shares, damages of $1,673,988. *Ibid.* The District Court also granted an award of prejudgment interest and entered an injunction, consistent with the mandate of the Court of Appeals, barring Bangor from voting the illegally acquired Piper shares for five years. *Id.*, at 526.

H

Court of Appeals' Opinion on Relief April 11, 1975

In the final phase of the litigation, the Court of Appeals reversed on the damages issue and calculated Chris-Craft's damages without further remand to the District Court. The Court of Appeals fixed damages as the difference between what Chris-Craft had actually paid for Piper shares and the price at which the large minority block could have been sold at the earliest point after Bangor Punta gained control. Application of this formula produced damages in the amount of $36.98 per Piper share held by Chris-Craft, or a total of $25,793,365. 516 F. 2d 172, 190 (1975). The court instructed the District Court to recompute prejudgment interest based on the revised damages award. *Id.*, at 191. This new computation increased Chris-Craft's prejudgment interest from $600,000 to approximately $10 million.

It is this judgment which is now under review.

III

The Williams Act

We turn first to an examination of the Williams Act, which was adopted in 1968 in response to the growing use of cash tender offers as a means for achieving corporate takeovers.[16] Prior to the 1960's, corporate takeover attempts had typically involved either proxy solicitations, regulated under § 14 of the Securities Exchange Act, 15 U. S. C. § 78n, or exchange offers of securities, subject to the registration requirements of the 1933 Act. § 77e. The proliferation of cash tender offers, in which publicized requests are made and intensive campaigns conducted for tenders of shares of stock at a fixed price, removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws. See generally S. Rep. No. 550, 90th Cong., 1st Sess., 2–4 (1967) (hereinafter Senate Report); H. R. Rep. No. 1711, 90th Cong., 2d Sess., 2–4 (1968) (hereinafter House Report).

To remedy this gap in federal regulation, Senator Harrison Williams introduced a bill in October 1965 to subject tender offerors to advance disclosure requirements. The original proposal, S. 2732, evolved over the next two years in response to positions expressed by the SEC and other interested parties from private industry and the New York Stock Exchange. 113 Cong. Rec. 854 (1967) (remarks of Sen. Williams). As subsequently enacted, the legislation requires takeover bidders to file a statement with the Commission indicating, among other things, the "background and identity" of the offeror, the source and amount of funds or other consideration to be used in making the purchases, the

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[16] The proliferation of cash tender offers as devices for securing corporate control is analyzed in detail in Hayes & Taussig, Tactics of Cash Takeover Bids, 45 Harv. Bus. Rev. 135 (Mar.–Apr. 1967). See also E. Aranow & H. Einhorn, Tender Offers for Corporate Control 2–10 (1973).

extent of the offeror's holdings in the target corporation, and the offeror's plans with respect to the target corporation's business or corporate structure. 15 U. S. C. § 78m (d)(1).

In addition to disclosure requirements, which protect all target shareholders, the Williams Act provides other benefits for target shareholders who elect to tender their stock. First, stockholders who accept the tender offer are given the right to withdraw their shares during the first seven days of the tender offer and at any time after 60 days from the commencement of the offer. § 78n (d)(5). Second, where the tender offer is for less than all outstanding shares and more than the requested number of shares are tendered, the Act requires that the tendered securities be taken up pro rata by the offeror during the first 10 days of the offer. § 78n (d)(6).[17] This provision, according to Senator Williams, was specifically designed to reduce pressures on target shareholders to deposit their shares hastily when the takeover bidder makes its tender offer on a first-come, first-served basis. 113 Cong. Rec. 856 (1967). Finally, the Act provides that if, during the course of the offer, the amount paid for the target shares is increased, all tendering shareholders are to receive the additional consideration, even if they tendered their stock before the price increase was announced. 15 U. S. C. § 78n (d)(7). See generally 1 A. Bromberg, Securities Law: Fraud § 6.3 (551), p. 120.2 (1975).

[17] The SEC had proposed that the pro rata requirement be applied throughout the duration of the offer. Hearings on S. 510 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 200 (1967) (hereinafter Senate Hearings). See generally Cohen, A Note on Takeover Bids and Corporate Purchases of Stock, 22 Bus. Law. 149, 153–154 (1966). See also 6 L. Loss, Securities Regulation 3662 (Supp. 1969). This open-ended proposal came under substantial criticism in the legislative hearings, and Congress finally enacted a 10-day limitation on the pro rata acceptance requirement. The 10-day period was identical to the practice followed by the New York Stock Exchange. Senate Hearings 76.

Besides requiring disclosure and providing specific benefits for tendering shareholders, the Williams Act also contains a broad antifraud prohibition, which is the basis of Chris-Craft's claim. Section 14 (e) of the Securities Exchange Act, as added by § 3 of the Williams Act, 82 Stat. 457, 15 U. S. C. § 78n (e), provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

This provision was expressly directed at the conduct of a broad range of persons, including those engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer. Senate Report 11.

The threshold issue in these cases is whether tender offerors such as Chris-Craft, whose activities are regulated by the Williams Act, have a cause of action for damages against other regulated parties under the statute on a claim that antifraud violations by other parties have frustrated the bidder's efforts to obtain control of the target corporation. Without reading such a cause of action into the Act, none of the other issues need be reached.

IV

Our analysis begins, of course, with the statute itself. Section 14 (e), like § 10 (b), makes no provision whatever for a private cause of action, such as those explicitly provided in other sections of the 1933 and 1934 Acts. *E. g.*, §§ 11, 12, 15 of the 1933 Act, 15 U. S. C. §§ 77k, 77*l*, 77*o*; §§ 9, 16, 18, 20

of the 1934 Act, 15 U. S. C. §§ 78i, 78p, 78r, 78t. This Court has nonetheless held that in some circumstances a private cause of action can be implied with respect to the 1934 Act's antifraud provisions, even though the relevant provisions are silent as to remedies. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (§ 14(a)); *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971) (§ 10 (b)).

The reasoning of these holdings is that, where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute. For example, in *J. I. Case Co.* v. *Borak, supra*, recognizing an implied right of action in favor of a shareholder complaining of a misleading proxy solicitation, the Court concluded as to such a shareholder's right:

> "While [§ 14 (a)] makes no specific reference to a private right of action, among its chief purposes is *'the protection of investors,'* which certainly implies the availability of judicial relief *where necessary to achieve that result.*" 377 U. S., at 432. (Emphasis supplied.)

Indeed, the Court in *Borak* carefully noted that because of practical limitations upon the SEC's enforcement capabilities, "[p]rivate enforcement . . . provides *a necessary supplement to Commission action.*" *Ibid.* (Emphasis added.) Similarly, the Court's opinion in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975), in reaffirming the availability of a private right of action under § 10 (b), specifically alluded to the language in *Borak* concerning the *necessity* for supplemental private remedies without which congressional protection of shareholders would be defeated. See also *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 62 (1975).

Against this background we must consider whether § 14 (e), which is entirely silent as to private remedies, permits this Court to read into the statute a damages remedy for unsuccessful tender offerors. To resolve that question we turn to the

legislative history to discern the congressional purpose underlying the specific statutory prohibition in § 14 (e). Once we identify the legislative purpose, we must then determine whether the creation by judicial interpretation of the implied cause of action asserted by Chris-Craft is necessary to effectuate Congress' goals.

A

Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously. *Department of Air Force* v. *Rose*, 425 U. S. 352, 388–389 (1976) (BLACKMUN, J., dissenting); *United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 319 (1953) (Jackson, J., concurring); *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, 11 (1942). In this case both sides press legislative history on the Court not so much to explain the meaning of the language of a statute as to explain the absence of any express provision for a private cause of action for damages. As Mr. Justice Frankfurter reminded us: "We must be wary against interpolating our notions of policy in the interstices of legislative provisions." *Ibid.* With that caveat, we turn to the legislative history of the Williams Act.

In introducing the legislation on the Senate floor, the sponsor, Senator Williams, stated:

> "This legislation will close a significant gap in *investor protection* under the Federal securities laws by requiring the disclosure of pertinent information *to stockholders* when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967). (Emphasis supplied.)

The same theme of investor protection was emphasized eight months later by Senator Williams on the day the measure was passed by the Senate:

> "[The federal securities laws] provide protection for millions of American investors by requiring full disclosure

> of information in connection with the public offering and trading of securities. These laws have worked well in providing the public with adequate information on which to base intelligent investment decisions.
>
> . . . . .
>
> "There are, however, some areas still remaining where full disclosure is *necessary for investor protection* but not required by present law. One such area is the purchase by direct acquisition or by tender offers of substantial blocks of the securities of publicly held companies.
>
> "S. 510 . . . provides for investor protection in these areas." *Id.*, at 24664. (Emphasis supplied.)

Indeed, the bill as finally enacted by Congress was styled as a disclosure provision: "A bill to provide for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934." See generally 1 A. Bromberg, *supra*, § 6.3 (121), at 116.2.

Confirming the view that the legislation was designed to fill "a rather large gap in the securities statutes," Manuel Cohen, then Chairman of the SEC, testified before the Senate Subcommittee on Securities:

> "[T]he general approach . . . of this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts . . . ." Senate Hearings 15.

In response to the suggestion that the legislation would tend to aid entrenched management in warding off potentially beneficial takeover bids, Chairman Cohen testified:

> "But *the principal point is that we are not concerned with assisting or hurting either side.* We are concerned with *the investor* who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere

in the shuffle. *This is our concern and our only concern.*" *Id.*, at 178. (Emphasis supplied.)

The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies. That tender offerors were not the intended beneficiaries of the bill was graphically illustrated by the statements of Senator Kuchel, cosponsor of the legislation, in support of requiring takeover bidders, whom he described as "corporate raiders" and "takeover pirates," to disclose their activities.

> "Today there are those individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management *or shareholders* having any knowledge of the acquisitions. . . . The corporate raider may thus act under a cloak of secrecy while obtaining the shares needed to put him on the road to a successful capture of the company." 113 Cong. Rec. 857–858 (1967). (Emphasis supplied.)

At different stages of the legislative debate, Senator Kuchel called the Senate's attention to specific takeover attempts directed against two companies. During the floor debate on the day S. 510 was passed, Senator Kuchel described one takeover contest:

> "If this attempt had succeeded, [the company] would have found itself under the control of a combination including significant foreign interests, without prior notice to the company, without an opportunity for examination into the circumstances surrounding the tender

> offer, and without any regard *for the rights of its stockholders.*" *Id.*, at 24665. (Emphasis supplied.)

Moreover, the Senate Subcommittee heard the testimony of Professor Hayes, speaking on behalf of himself and his co-author of a comprehensive study on takeover attempts,[18] who stated:

> "The two major protagonists—the bidder and the defending management—*do not need any additional protection,* in our opinion. They have the resources and the arsenal of moves and countermoves which can adequately protect their interests. Rather, *the investor*—who is the subject of these entreaties of both major protagonists—*is the one who needs a more effective champion . . . .*" Senate Hearings 57. (Emphasis supplied.)

In the face of this legislative history, the Court of Appeals understandably did not rely upon the legislative materials to support an implied cause of action for damages in favor of Chris-Craft. In this Court, however, Chris-Craft and the SEC contend that Congress clearly intended to protect tender offerors as part of a "pervasive scheme of federal regulation of tender offers." In support of their reading of the legislative history, they emphasize, first, that in enacting the legislation Congress was intent upon establishing a policy of evenhandedness in takeover regulation. Congress was particularly anxious, Chris-Craft argues, " 'to avoid tipping the balance of regulation . . . .' "

Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors. Indeed, the statements concerning the need for Congress to

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[18] Hayes & Taussig, Tactics of Cash Takeover Bids, *supra,* n. 16.

maintain a neutral posture in takeover attempts are contained in the section of the Senate Report entitled, "Protection of Investors." Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the "pawn[s] in a form of industrial warfare." The Senate Report expressed the purpose as "plac[ing] investors on an equal footing with the takeover bidder," Senate Report 4, without favoring either the tender offeror or existing management. This express policy of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance.

Moreover, closer analysis shows that Congress' "equal footing" observations were in response to strong criticisms that the proposed legislation would unduly inhibit tender offers.[19] As originally introduced, the disclosure proposals embodied in S. 2731 were avowedly pro-management in the target company's efforts to defeat takeover bids. See generally Note, The Williams Amendments: An Evaluation of the Early Returns, 23 Vand. L. Rev. 700 (1970). Subsequent committee hearings, however, indicated, first, that takeover bids could often serve a useful function, and, second, that entrenched management, equipped with considerable weapons in battles for control, tended to be successful in fending off possibly beneficial takeover attempts. Several witnesses specifically called the efficacy of the proposed legislation into question, since in their view the "scales are pretty unbalanced at the moment, and unbalanced very much in favor of management." Senate Hearings 117.

The sponsors of this legislation were plainly sensitive to the suggestion that the measure would favor one side or the other in control contests; however, they made it clear that

[19] Requiring the tender offeror to reveal detailed information at the outset of the quest for control would, under the critics' analysis, fortify management's position in rebuffing contestants' efforts.

the legislation was designed solely to get needed information to the investor, the constant focal point of the committee hearings. Senator Williams articulated this singleness of purpose, even while advocating neutrality:

> "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. *S. 510 is designed solely to require full and fair disclosure for the benefit of investors.*" 113 Cong. Rec. 24664 (1967). (Emphasis supplied.)

Accordingly, the congressional policy of "evenhandedness" is nonprobative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder.

Besides the policy of evenhandedness, Chris-Craft emphasizes that the matter of implied private causes of action was raised in written submissions to the Senate Subcommittee. Specifically, Chris-Craft points to the written statements of Professors Israels and Painter, who made reference to *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). Chris-Craft contends, therefore, that Congress was aware that private actions were implicit in § 14 (e).

But this conclusion places more weight on the passing reference to *Borak* than can reasonably be carried. Even accepting the value of written statements received without comment by the committee and without cross-examination,[20] the statements do not refer to implied private actions by

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[20] Only last Term we indicated that similar materials in the legislative history of the 1934 Act were of limited value.

"Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 204 n. 24 (1976).

See generally 2A C. Sands, Sutherland on Statutes and Statutory Construction § 48.06, p. 203 (4th ed. 1973).

offeror-bidders. For example, Professor Israels' statement on this subject reads:

> "[A] private litigant could seek similar relief before or after the significant fact *such as the acceptance of his tender of securities.*" Senate Hearings 67. (Emphasis supplied.)

Similarly, Professor Painter in his written submission referred to "injured investors." *Id.*, at 140. Neither Israels nor Painter discussed or even alluded to remedies potentially available to takeover bidders.

More important, these statements referred to a case in which the remedy was afforded to shareholders—the *direct* and *intended* beneficiaries of the legislation. In *Borak*, the Court emphasized that § 14 (a), the proxy provision, was adopted expressly for "the protection of investors," 377 U. S., at 432, the very class of persons there seeking relief.[21] The

[21] The dissent emphasizes that *Borak* involved a derivative suit brought on behalf of the corporation, in addition to the shareholder's direct cause of action. Since corporations were not the primary beneficiaries of § 14 (a)—the proxy provision involved in *Borak*—the dissent concludes that *Borak* itself fails to meet the "especial class" requirement articulated by our subsequent decision in *Cort* v. *Ash*. *Post*, at 66–67. But this is a misreading of *Borak;* there, the Court observed that deceptive proxy solicitations violative of § 14 (a) injure the corporation in the following sense:

"The damage suffered results not from the deceit practiced on [the individual shareholder] alone but rather from the deceit practiced on the stockholders as a group." 377 U. S., at 432.

The *Borak* Court was thus focusing on all stockholders—the owners of the corporation—as the beneficiaries of § 14 (a). Stockholders as a class therefore plainly constituted the "especial class" for which the proxy provisions were enacted. This reading of *Borak* comports with the statement of the question presented in that case:

"We consider only the question of whether § 27 of the Act authorizes a federal cause of action for rescission or damages *to a corporate stockholder* with respect to a consummated merger. . . ." 377 U. S., at 428. (Emphasis supplied.)

Court found no difficulty in identifying the legislative objective and concluding that remedies should be available if necessary "to make effective the congressional purpose." *Id.*, at 433. *Borak* did not involve, and the statements in the legislative history relied upon by Chris-Craft do not implicate, the interests of parties such as offeror-bidders who are outside the scope of the concerns articulated in the evolution of this legislation.[22]

Chris-Craft and the SEC also rely upon statements in the legislative history which, they suggest, demonstrate that Congress in adopting the Williams Act was concerned with parties other than shareholders. First, they place particular emphasis upon a statement by Chairman Cohen in his Senate testimony that "shareholders are not the only persons concerned." From this statement, they argue that tender offerors were likewise within the sphere of congressional concern. In that colloquy, however, Chairman Cohen was plainly referring to persons in need of disclosure:

> "As soon as there is a takeover bid, everybody in the market gets excited. There are people who consider themselves professional or amateur arbitragers, and they begin to play the games that possibility permits." Senate Hearings 178.

Thus, Chairman Cohen was referring to other actors in the marketplace, including arbitragers, who would benefit from disclosure. He was not referring to the needs of those required by the proposed legislation to make disclosure, the tender offerors themselves.

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[22] In this connection, Chris-Craft emphasizes Congress' intent to treat tender offers in the same way as proxy solicitations, since both are devices for seeking corporate control. This argument, however, does not support the proposition that Chris-Craft should have a cause of action for damages, since this Court had not then held, nor has it since, that defeated insurgents in a proxy fight, suing in a capacity other than that of a shareholder, have a cause of action for damages. There is no occasion to resolve that question in this case.

Finally, Chris-Craft emphasizes what it perceives as the Commission's express concern with the plight of takeover bidders faced with "unfair tactics by entrenched management." The SEC Chairman did indeed speak in the Subcommittee Hearings of the need to "regulate improper practices by management and others opposing a tender offer . . . ." Senate Hearings 184. But in so doing, he was not pleading the cause of takeover bidders; on the contrary, he testified that imposing disclosure duties upon management would "make it much easier for *stockholders* to evaluate the offer on its merits." *Ibid.* (Emphasis supplied.)

In short, by extending the statute's coverage to solicitations in opposition to tender offers, Congress was seeking to broaden the scope of protection afforded to shareholders confronted with competing claims. Senator Williams, for example, was fully aware that in a contest for control, full disclosure by all contestants was needed to protect shareholders:

> "In the rather common situation where existing management or third parties contest a tender offer, shareholders may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or to reject the tender offer. The experience of the SEC with proxy fights offers ample evidence that this type of situation can best be controlled, and *shareholders most adequately informed,* if both sides to the argument are subject to the full and fair disclosure rules of the Federal securities laws." 113 Cong. Rec. 855–856 (1967). (Emphasis supplied.)

Furthermore, in the very passages on which Chris-Craft relies as evidencing SEC concern for tender offerors, Chairman Cohen criticized any analysis which focused upon the legislation's impact on management or the takeover bidder:

> "Moreover, this type of analysis lays almost exclusive stress on the respective interests of the offeror and the

> existing management, *rather than upon the protection of the stockholders* . . . who are left to be treated as pawns in an elaborate game between the offerors and the management or perhaps other competing interests." Senate Hearings 184. (Emphasis supplied.)

The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer. As we stated in *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S., at 58: "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information . . . ." We find no hint in the legislative history, on which respondent so heavily relies, that Congress contemplated a private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against the target corporation.

The dissent suggests, however, that Chris-Craft is suing under § 14 (e) for injuries sustained in its status as a Piper shareholder, as well as in its capacity as a defeated tender offeror. *Post*, at 56–59. In contrast to that suggestion, Chris-Craft's position in this Court on the issue of standing is based on the narrow ground that the Williams Act was designed to protect not only target company shareholders, but rival contestants for control as well. Brief for Respondent 36–40, 43, 46–48, 50–54. It is clear, therefore, that Chris-Craft has not asserted standing under § 14 (e) as a Piper shareholder. The reason is not hard to divine. As a tender offeror actively engaged in competing for Piper stock, Chris-Craft was not in the posture of a target shareholder confronted with the decision of whether to tender or retain its stock. Consequently, Chris-Craft could scarcely have alleged a need for the disclosures mandated by the Williams Act. In short, the fact that Chris-Craft necessarily acquired Piper stock as a means of taking over Piper adds nothing to its § 14 (e) standing

arguments.[23] This probably explains why the Court of Appeals at no time intimated that it rested Chris-Craft's standing on its status as a Piper stockholder. Its opinion in this respect could hardly be clearer:

> "This is a case of first impression with respect to *the right of a tender offeror* to claim damages for statutory violations by his adversary. And our holding is premised on the belief that the harm done the defeated contestant is not that it had to pay more for the stock *but that it got less stock than it needed for control.*" 480 F. 2d, at 362. (Emphasis supplied.)

Moreover, the items of damages cited in dissent, *post*, at 57–58, n. 6, as attributable to Chris-Craft in its status as a Piper shareholder are, upon analysis, actually related *under these circumstances* to Chris-Craft's status as a contestant for control of a corporation. First, the alleged "loss of the control premium," which Chris-Craft presumably otherwise would have enjoyed, relates on its face, not to Chris-Craft as a Piper shareholder *per se*, but to its status as a shareholder who failed to gain control. Second, the alleged loss of value as to a "locked-in," "exceptionally large block" of Piper stock likewise relates under these circumstances to a particular kind of Piper shareholder, namely one whose efforts to secure control necessarily resulted in the acquisition of major stockholdings in the company. In this regard, the Court of Ap-

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[23] The dissent's approach fails to focus upon the precise goals served by the Williams Act, an indispensable inquiry under *Borak*. Both Chris-Craft and Bangor Punta were, to be sure, Piper shareholders once each had embarked upon an attempt to gain control of the target company. But neither offeror-bidder stood in the shoes of the Act's intended beneficiaries. "[T]his bill is [designed] to provide the investor, *the person who is required to make a decision*, an opportunity to examine and to assess the relevant facts . . . ." Senate Hearings 15. (Emphasis supplied.) In short, the dissent overlooks the fact that in no meaningful sense was either Chris-Craft or Bangor Punta, as a tender offeror, a "target shareholder" of Piper.

peals plausibly assumed that in order to dispose of its Piper holdings Chris-Craft would have to file a registration statement with the SEC, since Chris-Craft would presumably be engaged in a distribution of Piper stock. 516 F. 2d, at 188–189. In contrast, no ordinary Piper shareholder would have had to comply with the 1933 Act's registration requirements in order to sell his stock, since the typical shareholder is not "an issuer, underwriter, or dealer." 15 U. S. C. § 77d (1).

Consequently, the elements of damages mentioned in dissent are peculiar to Chris-Craft not as a "target shareholder" of Piper, but as a defeated tender offeror "injured" by its adversaries' alleged violations of the securities laws.[24]

B

Our conclusion as to the legislative history is confirmed by the analysis in *Cort* v. *Ash*, 422 U. S. 66 (1975). There, the Court identified four factors as "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. The first is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted . . . .' " *Id.*, at 78. (Emphasis in original.) As previously indicated, examination of the statute and its genesis shows that Chris-Craft is not an intended beneficiary of the Williams Act, and surely is not one "for whose *especial* benefit the statute was enacted." *Ibid.* To the contrary, Chris-Craft is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class, shareholder-offerees. As a party whose previously unregulated conduct was purposefully brought under federal control by the statute, Chris-Craft can scarcely lay claim to the status of "beneficiary" whom Congress considered in need of protection.

[24] In light of our holding there is, of course, no occasion to pass on the Court of Appeals' underlying determination that petitioners actually violated the securities laws in their efforts to defeat Chris-Craft's bid. See also *infra*, at 43 n. 30.

Second, in *Cort* v. *Ash* we inquired whether there was "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Ibid.* Although the historical materials are barren of any express intent to deny a damages remedy to tender offerors as a class, there is, as we have noted, no indication that Congress intended to create a damages remedy in favor of the loser in a contest for control. Fairly read, we think the legislative documents evince the narrow intent to curb the unregulated activities of tender offerors. The expression of this purpose, which pervades the legislative history, negates the claim that tender offerors were intended to have additional weapons in the form of an implied cause of action for damages, particularly if a private damages action confers no advantage on the expressly protected class of shareholder-offerees, a matter we discuss later. *Infra*, at 39.

Chris-Craft argues, however, that Congress intended standing under § 14 (e) to encompass tender offerors since the statute, unlike § 10 (b), does not contain the limiting language, "in connection with the purchase or sale" of securities. Instead, in § 14 (e), Congress broadly proscribed fraudulent activities "in connection with any tender offer . . . or any solicitation . . . in opposition to or in favor of any such offer. . . ."

The omission of the purchaser-seller requirement does not mean, however, that Chris-Craft has standing to sue for damages under § 14 (e) in its capacity as a takeover bidder. It may well be that Congress desired to protect, among others, shareholder-offerees who decided not to tender their stock due to fraudulent misrepresentations by persons opposed to a takeover attempt. See generally 1 A. Bromberg, Securities Law: Fraud § 6.3 (1021), p. 122.17 (1969). See also Senate Report 2; House Report 3. These shareholders, who might not enjoy the protection of § 10 (b) under *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), could perhaps

state a claim under § 14 (e), even though they did not tender their securities.[25] But increased protection, if any, conferred upon the class of shareholder-offerees by the elimination of the purchaser-seller restriction can scarcely be interpreted as giving protection to the entirely separate and unrelated class of persons whose conduct the statute is designed to regulate.

Third, *Cort* v. *Ash* tells us that we must ascertain whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." 422 U. S., at 78. We conclude that it is not. As a disclosure mechanism aimed especially at protecting shareholders of target corporations, the Williams Act cannot consistently be interpreted as conferring a monetary remedy upon regulated parties, particularly where the award would not redound to the direct benefit of the protected class. Although it is correct to say that the $36 million damages award indirectly benefits those Piper shareholders who became Chris-Craft shareholders when they accepted Chris-Craft's exchange offer, it is equally true that the damages award injures those Piper shareholders who exchanged their shares for Bangor Punta's stock and who, as Bangor Punta shareholders, would necessarily bear a large part of the burden of any judgment against Bangor Punta. The class sought to be protected by the Williams Act are the shareholders of the *target* corporation; hence it can hardly be said that their interests as a class are served by a judgment in favor of Chris-Craft and against Bangor Punta. Moreover, the damages are awarded to the very party whose activities Congress intended to curb; Chris-Craft did not sue in the capacity of an injured Piper shareholder, but as a defeated tender offeror.

Nor can we agree that an ever-present threat of damages against a successful contestant in a battle for control will provide significant additional protection for sharehold-

[25] These cases, of course, do not present that issue, and we express no view on it.

ers in general. The deterrent value, if any, of such awards can never be ascertained with precision. More likely, however, is the prospect that shareholders may be prejudiced because some tender offers may never be made if there is a possibility of massive damages claims for what courts subsequently hold to be an actionable violation of § 14 (e).[26] Even a contestant who "wins the battle" for control may well wind up exposed to a costly "war" in a later and successful defense of its victory. Or at worst—on Chris-Craft's damages theory—the victorious tender offeror or the target corporation might be subject to a large substantive judgment, plus high costs of litigation.

In short, we conclude that shareholder protection, if enhanced at all by damages awards such as Chris-Craft contends for, can more directly be achieved with other, less drastic means more closely tailored to the precise congressional goal underlying the Williams Act.

Fourth, under the *Cort* v. *Ash* analysis, we must decide whether "the cause of action [is] one traditionally relegated to state law . . . ." 422 U. S., at 78. Despite the pervasiveness of federal securities regulation, the Court of Appeals concluded in these cases that Chris-Craft's complaint would give rise to a cause of action under common-law principles of interference

[26] The liability of the Piper family petitioners is instructive in this regard. Several able federal judges, including District Judges Tenney and Pollack and Chief Judge Lumbard of the Second Circuit, have expressly concluded that the Piper defendants did *not* violate the securities laws in their efforts to defeat Chris-Craft's bid. Judge Mansfield, while of the view that the Pipers had violated § 14 (e), was convinced that their violations had not caused injury to Chris-Craft. The legal uncertainties that inevitably pervade this area of the law call into question whether "deterrence" of § 14 (e) violations is a meaningful goal, except possibly with respect to the most flagrant sort of violations which no reasonable person could consider lawful. Such cases of flagrant misconduct, however, are not apt to occur with frequency, and to the extent that the violations are obvious and serious, injunctive relief at an earlier stage of the contest is apt to be the most efficacious form of remedy.

with a prospective commercial advantage. Although Congress is, of course, free to create a remedial scheme in favor of contestants in tender offers, we conclude, as we did in *Cort* v. *Ash*, that "it is entirely appropriate in this instance to relegate [the offeror-bidder] and others in [that] situation to whatever remedy is created by state law," *id.*, at 84, at least to the extent that the offeror seeks damages for having been wrongfully denied a "fair opportunity" to compete for control of another corporation.

C

What we have said thus far suggests that, unlike *J. I. Case Co.* v. *Borak*, *supra*, judicially creating a damages action in favor of Chris-Craft is unnecessary to ensure the fulfillment of Congress' purposes in adopting the Williams Act. Even though the SEC operates in this context under the same practical restraints recognized by the Court in *Borak*, institutional limitations alone do not lead to the conclusion that any party interested in a tender offer should have a cause of action for damages against a competing bidder.[27] First,

[27] The dissent suggests that the SEC's "intimate involvement in the passage of the Act, entitle[s] its views to respect." *Post*, at 64. We note, first, that the present position of the SEC is not consistent with the testimony of the SEC Chairman in the legislative evolution of § 14 (e). Even if the agency spoke with a consistent voice, however, its presumed "expertise" in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the "administrative deference" rule, even when the SEC supported the result reached in the particular case. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971). That rule is more appropriately applicable in instances where, unlike here, an agency has rendered binding, consistent, official interpretations of its statute over a long period of time. *E. g.*, *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719 (1975); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

as Judge Friendly observed in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937, 947 (CA2 1969), in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, "is the time when relief can best be given." Furthermore, awarding damages to parties other than the protected class of shareholders has only a remote, if any, bearing upon implementing the congressional policy of protecting shareholders who must decide whether to tender or retain their stock.[28] Indeed, as we suggested earlier, a damages award of this nature may well be inconsistent with the interests of many members of the protected class and of only indirect value to shareholders who accepted the exchange offer of the defeated takeover contestant.

We therefore conclude that Chris-Craft, as a defeated tender offeror, has no implied cause of action for damages under § 14 (e).

V

In addition to its holding under § 14 (e), the Court of Appeals held that Bangor was liable for damages under Rule 10b–6 because of its off-exchange cash purchases of Piper stock in May 1969. Although the Court of Appeals imposed joint and several liability upon all defendants with respect to the injury occasioned by Bangor's achieving control of Piper, our holding in Part IV, *supra*, that no cause of action for damages lies under § 14 (e) in favor of Chris-

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[28] Our holding is a limited one. Whether shareholder-offerees, the class protected by § 14 (e), have an implied cause of action under § 14 (e) is not before us, and we intimate no view on the matter. Nor is the target corporation's standing to sue in issue in this case. We hold only that a tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under § 14 (e).

Our precise holding disposes of many observations made in dissent. Thus, the argument with respect to the "exclusion" from standing for "persons most interested in effective enforcement," *post*, at 62, is simply unwarranted in light of today's narrow holding.

Craft, necessarily removes all petitioners except Bangor Punta from any potential liability in these cases. The issue that remains is whether Chris-Craft has a cause of action for damages against Bangor alone by virtue of the latter's alleged Rule 10b–6 violations. We hold that it does not.

Rule 10b–6 [29] is an antimanipulative provision designed to protect the orderliness of the securities market during distributions of stock. The Rule in essence prohibits issuers whose stock is in the process of distribution from market tampering by purchasing either the stock or rights to purchase the stock until the distribution has been completed. The purpose of the Rule is to prevent stimulative trading by an issuer in its own securities in order to create an unnatural and unwarranted appearance of market activity. See generally E. Aranow & H. Einhorn, Tender Offers for Corporate Control 131 (1973). Here, the Court of Appeals held, and its holding is unchallenged, that the cash purchases of Piper stock during the pendency of Bangor's exchange offer constituted purchases of "right[s] to purchase" Bangor stock within the meaning of Rule 10b–6.[30]

Without questioning the finding of Rule 10b–6 violations, Bangor strenuously argues that Chris-Craft fails the standing test applied in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975).[31] The concern of Rule 10b–6 in these circumstances, Bangor suggests, is to foreclose manipulative trading which would affect the price of Bangor Punta stock, since Bangor Punta securities were being distributed

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[29] Rule 10b–6 is set forth in part in n. 2, *supra*.

[30] We therefore have no occasion to consider whether the cash purchases by Bangor actually violated Rule 10b–6, and we express no view on that question. The issue is of secondary importance, since Rule 10b–13 now expressly covers this type of transaction.

[31] In *Blue Chip*, we applied the *Birnbaum* rule, *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (CA2), cert. denied, 343 U. S. 956 (1952), which limited standing under Rule 10b–5 to purchasers or sellers of securities.

in the exchange offer. Because Chris-Craft neither purchased nor sold Bangor securities, it is foreclosed, under Bangor's analysis, from suing under Rule 10b–6.

If we accepted Bangor's analysis, Rule 10b–6 would provide no remedy for an entire class of persons who actually purchased or sold securities, namely, those investors who either bought or sold Piper stock, which in turn represented "rights" to purchase Bangor stock then in distribution. This class of securities would, under the SEC's theory, be potentially affected by Bangor's off-exchange purchases, since acquisitions of rights to acquire stock during a distribution have, under the SEC's view of Rule 10b–6, at least the potential for artificially raising the price of those rights. Thus, Bangor's theory would foreclose, among others, any investors who purchased Piper stock after the unlawful acquisitions; this would be true even though the price paid for the stock might be shown to reflect the stimulative effects of Bangor's off-market, block purchases. In this respect, this case is readily distinguishable from *Blue Chip*, where the complainants made no purchases of stock at all; unlike that situation, here Chris-Craft was a purchaser of Piper common stock, the very class of securities with respect to which Bangor was held to have committed Rule 10b–6 violations.

We conclude, however, that these cases do not call for a definitive resolution of the law of standing under Rule 10b–6, as Bangor would have us do. Nor do we find it appropriate to do so under the unusual circumstances presented here. First, the Court of Appeals, although sensitive to the *Birnbaum* issue, did not have the benefit of our decision in *Blue Chip* in resolving the standing issue. Second, in this Court both Chris-Craft and the United States, in its *amicus* brief on certiorari, contend that § 14 (e)'s broad prohibition of "manipulative acts or practices" in tender offers embraces acts proscribed under the more specific mandate of Rule 10b–6. Brief for Respondent 56; Brief for United States as

Amicus Curiae 16–17. Thus, to this extent the issue of Rule 10b–6 standing has not been fully explored by the parties, because of their initial misconception as to Chris-Craft's standing to sue for damages under § 14 (e).

Although we reserve judgment on the broader standing issues arising under Rule 10b–6, we hold that, in the context of these cases, Chris-Craft is without standing to sue for damages on account of Bangor's alleged Rule 10b–6 violations. Our holding is based upon one critical factor: As the parties themselves have framed the issues for resolution in this litigation, Chris-Craft is clearly outside the express concern of Rule 10b–6. At no time has Chris-Craft complained of or even suggested that the price which it paid for Piper shares was influenced by Bangor's Rule 10b–6 violations. Indeed, Chris-Craft does not assert standing as a *Piper shareholder;* on the contrary, it claims damages because, in its view of the case, it lost the opportunity to gain control of Piper by virtue of Bangor's Rule 10b–6 violations. Assuming the correctness of this theory, the fact remains that Rule 10b–6 is not directed at or concerned with contests for corporate control. This technical rule is focused narrowly upon a precise goal—maintaining an orderly market for the distribution of securities free from artificial or manipulative influences. Thus, as the issues have been framed, Chris-Craft did not come to the courts in the posture of a hoodwinked investor victimized by market manipulation; its complaint, as we noted, is that it lost a chance to gain control of a corporation, a claim beyond the bounds of the specific concern of Rule 10b–6.

Our conclusion in this respect is buttressed by the close relationship of Rule 10b–6 with § 9 of the 1934 Act, 15 U. S. C. § 78i. Section 9, among other things, prohibits transactions by issuers in their own securities, if forbidden by SEC regulations, even though the transactions are designed to stabilize the market for the issuer's stock. § 78i (a)(6). The SEC suggests in its *amicus* brief that Rule

10b–6 was promulgated pursuant to the Commission's authority under § 9 (a)(6),[32] as well as under §10 (b) of the 1934 Act. It contends that, in view of this bifurcated statutory origin, Chris-Craft need only be a purchaser of Piper stock to have standing under Rule 10b–6, since § 9 requires only that an aggrieved party have purchased or sold "any security" affected by the violation. 15 U. S. C. § 78i (e). Under this view, Chris-Craft's failure to purchase Bangor Punta stock is irrelevant, since its purchases of Piper shares satisfied the "any security" requirement of § 9.

Unlike § 10 (b), however, § 9 provides an express cause of action for persons injured by unlawful market activities. 15 U. S. C. § 78i (e). Yet, that cause of action is framed specifically in favor of "any person who shall purchase or sell any security *at a price which was affected by such act or transaction . . . .*" *Ibid.* (Emphasis supplied.) Congress therefore focused in § 9 upon the amount actually paid by an investor for stock that had been the subject of manipulative activity. This is not, as we have seen, the gravamen of Chris-Craft's complaint. It seeks no recovery for an improper premium exacted for Piper stock; rather it desires compensation for its lost opportunity to control Piper. We therefore conclude that, on its claimed basis for relief, Chris-Craft cannot avail itself of Rule 10b–6.

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[32] Section 9 (a)(6) provides:

"(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

"(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

VI

Our resolution of these issues makes it unnecessary to address the other questions raised by the parties in their petitions for certiorari. Since we have concluded that Chris-Craft cannot avail itself of § 14 (e) or Rule 10b–6 in its suit for damages, it is unnecessary to consider the Court of Appeals' holdings with respect to scienter, causation, the calculation of damages, the imposition of joint and several liability, the liability of underwriters in § 14 (e) damages actions, and the award of prejudgment interest.

Apart from awarding damages, however, the Court of Appeals also ordered the District Court to enjoin Bangor Punta from voting the illegally acquired Piper shares for a period of five years. In compliance with that directive, Judge Pollack on remand entered an injunction to remain in effect for a period of five years from November 12, 1974, the date on which judgment was entered. 384 F. Supp., at 528–529. On appeal, the Court of Appeals affirmed that portion of the District Court's order.

We hold that, under the circumstances presented here, this injunction should not have been granted. As we previously indicated, Chris-Craft prior to the trial on liability expressly waived any claim to injunctive relief. The case was tried in the District Court, without a jury, exclusively as a suit for damages. See 337 F. Supp., at 1136 n. 8, 1137, 1141–1142, n. 18, 1146. Accord, 480 F. 2d, at 355, 379. Under these circumstances, our holding that Chris-Craft does not have a cause of action for damages under § 14 (e) or Rule 10b–6 renders that injunction inappropriate, premised as it was upon the impermissible award of damages.[33] The inap-

[33] We intimate no view upon whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action for damages, would lie in favor of a tender offeror under either § 14 (e) or Rule 10b–6.

propriateness of the injunction is particularly acute in this litigation, where the order was entered almost four years after the contest for control had ended and where no regard was given to the interests of the protected class of shareholder-offerees, many of whom would be at least indirectly disadvantaged by the award.[34]

Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. For the reasons set out in MR. JUSTICE STEVENS' dissenting opinion, *post*, p. 53, I am willing to begin with the premise that respondent Chris-Craft had "standing" in the sense that it possessed an implied right to sue under § 14 (e) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n (e). Unlike the dissenters, however, I do not conclude, from this, that the Court of Appeals' judgment as to liability is to be affirmed. Since I am of the opinion that respondent failed to prove that petitioners' violations of the securities laws caused its injury, I agree with the Court that the judgment below should be reversed.[1]

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[34] The fact that the parties did not separately enumerate the injunction issue in their petitions for certiorari does not preclude review. The Court has in the exercise of its discretion traditionally examined matters of importance not specifically assigned as error by the parties. *E. g., Carpenters* v. *United States*, 330 U. S. 395, 412 (1947); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16 (1941); *Mahler* v. *Eby*, 264 U. S. 32, 45 (1924). Cf. this Court's Rule 40 (d) (2); *Oregon ex rel. State Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Exercise of this discretion is called for under these unusual circumstances, since a sweeping equitable remedy was ordered by the Court of Appeals to supplement an improper award of damages.

[1] Like the dissenters, I also accept the premise that the petitioning defendants violated § 14 (e) and Rule 10b-6.

I

For the sake of clarity, it is useful to review briefly the acts that constituted violations of the securities laws and to identify the violators.

Three violations of § 14 (e) were isolated by the District Court and the Court of Appeals. The first occurred when W. T. Piper, Jr., wrote the letter of January 27 to the Piper shareholders and therein described the Chris-Craft offer as "inadequate and not in the best interests of Piper's shareholders." Petitioner First Boston reviewed that letter. Chris-Craft alleged that the description of its offer was a misstatement of material fact. In addition, the letter omitted to reveal First Boston's opinion that the price Chris-Craft was offering for Piper shares was fair, and it failed to disclose the pending negotiations with Grumman Aircraft Corporation.

The second § 14 (e) violation occurred with the Piper press release and letter to its shareholders on January 29. The sins in this instance were those of omission: Although the release and letter discussed the agreement with Grumman, they were silent about Grumman's option to return the shares to Piper at cost plus interest, and about Piper's obligation to keep the sale proceeds in a separate fund free from liens.

Finally, the courts determined that petitioners Bangor Punta and First Boston omitted to state a material fact relating to the value of the Bangor & Aroostock Railroad (BAR) in the financial statements filed in connection with Bangor's exchange offer. Specifically, the papers did not reveal that Bangor had been offered only $5 million for the sale of BAR, in the face of the facts that BAR was carried on Bangor's books at $18.4 million, and that no other offer appeared to be forthcoming.

In addition to these § 14 (e) violations, the courts found that Bangor had not complied with Securities and Exchange Commission Rule 10b–6, 17 CFR § 240.10b–6 (1976). This

occurred when Bangor in May 1969 made its three privately negotiated large purchases of Piper stock, while awaiting the effective date of its exchange offer.

This summary reveals that, on the accepted premises, the Pipers were guilty both of misstatements of material facts and of omissions; that Bangor violated § 14 (e) by omitting to state material facts; that Bangor violated Rule 10b–6 by its purchases of the large blocks of Piper stock; and that First Boston, like Bangor, omitted to reveal material facts, both in connection with the Piper letters and with regard to the BAR negotiations.

II

Standards for proving causation in a securities law case were established in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), and in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972). It must be shown that the misstatement or omission is "material." That term most recently has been defined by this Court to mean that "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449 (1976). Assuming that materiality is established, *Mills* held that causation would be proved if the misleading proxy solicitation at issue there was an "essential link in the accomplishment of the transaction." 396 U. S., at 385.

Because cases involving omissions create difficult problems of proof of reliance, and hence causation, the Court elaborated on the *Mills* test in *Affiliated Ute Citizens:*

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to disclose and this withholding of a material

fact establish the requisite element of causation in fact." 406 U. S., at 153–154.

Affiliated Ute Citizens, of course, did not abolish the requirement of causation in failure-to-disclose cases. It simply provided the causal link between the omission of material information and the shareholder's act of purchasing or selling stock.

In the case of a suit by a tender offeror to recover damages suffered as a result of securities law violations by its competitors, causation is a far more complex issue. It is not enough for the offeror to prove that the competitor's violations caused the shareholders of the target corporation to act in a certain way. In addition, the offeror must show that the shareholders' reactions to the misstatements or omissions caused the injury for which it demands remuneration. Even though the *Mills-Affiliated Ute Citizens* presumption satisfies the requirements for proof of the first element of causation, the absence of any evidence that the violations might have altered the outcome of the contest for control would leave me unable to hold that the securities law violations caused the disappointed contestant's ultimate injury—its failure to acquire control of the target corporation.

III

Applying these principles to the present litigation, I cannot say that respondent proved that the actions of any of the petitioners caused its injury. The Pipers were guilty of misstatements in the letters and press releases that they issued and of omissions in those materials. With regard to both their misstatements and omissions, the most that can be presumed is that more of the Piper shareholders would have tendered to Chris-Craft in January, when the violations occurred. To go further, and to assume that Chris-Craft would have acquired enough more shares to succeed in its contest for control, is simply contrary to the facts. The Chris-Craft offer was completely successful, insofar as it invited tender for

300,000 shares and 304,606 shares were eventually tendered. Furthermore, the evidence was strong that Chris-Craft's financial resources had been strained to the limit. Bangor Punta had not even entered the contest for control as of January. It is just as likely that Chris-Craft would have been left with a substantial block of Piper shares and that the Piper family would have retained control of the company, given only the facts that existed at the time the Piper violations were committed. Under the circumstances, Chris-Craft failed to prove that the Piper actions caused the injury of which Chris-Craft complains.

Neither did Chris-Craft prove that any action of Bangor Punta or First Boston caused its injury. The reasons for rejecting the proof of causation as to the Pipers, with regard to the January violations, apply with equal force to First Boston's role in those letters and press releases. Slightly different considerations are relevant to the BAR negotiations. Because the information about the proposed sale was omitted from Bangor's registration materials, Bangor's financial position may have looked somewhat better than it actually was. But even if one presumes that the shareholders who tendered to Bangor would not have done so if they had known the truth, there is still no way of knowing what course the contest would have taken from that point onward. If the shareholders had a negative opinion of Chris-Craft's management, they might have elected to retain their shares and continue their own incumbent management. Or a third contestant might have appeared. Or Bangor might have secured cash to use for its acquisition program. These uncertainties demonstrate that even taking advantage of the *Mills-Affiliated Ute Citizens* presumption, a finding of causation of Chris-Craft's injury was far from logically compelled. It follows that neither Bangor nor First Boston may be held liable on account of the nondisclosure of the BAR negotiations.

Finally, Bangor's purchases of the large blocks of Piper stock must be considered. As to this, I find conclusive the

fact, noted by the Court, *ante*, at 45, that "[a]t no time has Chris-Craft complained of or even suggested that the price which it paid for Piper shares was influenced by Bangor's Rule 10b–6 violations." [2] If the price of the shares was uninfluenced, and sufficient shares were still held by the public to make control a real possibility for Chris-Craft, there was a failure to prove causation. Cf. *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 64 (1975).

For these reasons, I concur in the judgment of the Court.[3]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Williams Act was passed for the protection of investors. The threshold question in this case is whether the

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[2] The Rule 10b–6 violations do not raise the question of disclosure or nondisclosure of material facts, since that Rule deals with market manipulation. Thus, on this feature, the *Mills-Affiliated Ute Citizens* presumptions do not even enter the case.

[3] The dissenters note that Chris-Craft's recovery included elements of damages that were not dependent on proof that it actually would have acquired control of Piper. Since I view the ultimate injury to be the frustration of Chris-Craft's efforts to obtain control of Piper, cf. opinion of the Court, *ante*, at 24, I think that the recovery should not have included elements unrelated to the failure to achieve control. Furthermore, even if the injury was merely the diminished opportunity for success, I would still find the proof of causation inadequate. Because Chris-Craft's January offer was a complete success, and its financial resources were practically exhausted, the presumption that more Piper shareholders would have tendered but for the violations committed by the Pipers and First Boston was rebutted. Similarly, the uncertainties surrounding the probable effect of the BAR omissions on the shareholders' decisions make it impossible to presume that Chris-Craft's chances of success were lessened by that violation. Finally, the fact that the price of Piper shares was uninfluenced by the alleged Rule 10b–6 violation negates the possibility of injury on a diminished-opportunity theory just as surely as on a failure-to-succeed theory. I would therefore find a failure to prove causation under either view of Chris-Craft's injury.

holder of a large block of stock who is seeking to retain or to acquire control of a corporation is one of the investors the statute was intended to protect.

The critical issue can be framed by concentrating on the exchange offers in July 1969. The conclusion that Bangor Punta's offer violated § 14 (e) is established by prior proceedings and is not now open for review.[1] When that violation occurred, Chris-Craft owned 556,206 shares of Piper stock and was attempting to acquire sufficient additional shares to constitute control. As a result of Bangor Punta's violations, Chris-Craft claims that it was injured in two ways: the value of its investment in Piper stock was impaired,[2] and it lost the opportunity to purchase enough additional shares to control Piper.[3] The Court holds that Chris-Craft has no "standing" to recover damages for either injury no matter

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[1] This is the third chapter in the history of this monumental litigation. There have been three trials, three appeals, and three groups of certiorari petitions. Only the questions presented by the certiorari petitions granted on April 5, 1976, 425 U. S. 910, are before us. For the purpose of analyzing the standing issue, we must accept the premise that the petitioning defendants are guilty of violating § 14 (e) and Rule 10b–6.

[2] In ¶ 64 of its second amended complaint, Chris-Craft alleged: "The foregoing acts and courses of conduct by the defendants . . . sharply decreased the value of Chris-Craft's holdings in Piper . . . ." App. F–26. In its opinion on liability, the Court of Appeals noted: "The specific injury sustained [by Chris-Craft] was a reduction in the value of [its] Piper holdings . . . ." *Id.*, at A–60.

[3] Chris-Craft also alleged that "but for the unlawful acts of the defendants described herein, Chris-Craft would have achieved control of Piper," or at least would have paid less for stock it did acquire. Second amended complaint ¶ 65, App. F–26. In view of these separate allegations it is a little difficult to understand the suggestion, *ante*, at 35–37, that Chris-Craft is not suing for injuries sustained in its status as a Piper shareholder. The fact that the Court of Appeals correctly regarded Chris-Craft's status as a tender offeror as an adequate basis for relief does not imply rejection of its claim as a shareholder, particularly since the damages awarded by the Court of Appeals included compensation for the impaired value of its Piper holdings.

how flagrant Bangor Punta's violation may have been, no matter how direct the causal connection between that violation and Chris-Craft's injury, and no matter how serious the injury. I disagree with this holding.

No one seriously questions the premise that Congress implicitly created a private right of action when it enacted § 14 (e) in 1968.[4] Also beyond serious question is the proposition that the members of the class which Congress was especially interested in protecting may invoke that private remedy and, further, that the shareholders of a target corporation are members of that class. The Court nevertheless holds that Chris-Craft may not recover because the protected class does not include tender offerors even though they may also be shareholders; and, at least implicitly, that to the extent Chris-Craft was injured in its status as a shareholder, its injury is not of a kind that the statute was intended to avoid. I am persuaded that both holdings are erroneous. I first consider Chris-Craft's status as a shareholder and then its rights as a tender offeror. Finally, I explain why my analysis is consistent with *Cort* v. *Ash*, 422 U. S. 66.

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[4] Although originally one might have argued that the private remedies created by the Securities Acts are limited to those expressly described in the legislation itself, history has foreclosed any such argument today. The statutes originally enacted in 1933 and 1934 have been amended so often with full congressional awareness of the judicial interpretation of Rule 10b–5 as implicitly creating a private remedy that we must now assume that Congress intended to create rights for the specific beneficiaries of the legislation as well as duties to be policed by the SEC. This case therefore does not present the same kind of issue discussed in *Cort* v. *Ash*, 422 U. S. 66, namely, *whether* the statute created an implied private remedy. Rather, the question presented here is *who* may invoke that remedy. Nevertheless, it is noteworthy that none of the factors identified in the *Cort* opinion militates against implying a private cause of action in favor of Chris-Craft. Indeed, it is beyond dispute that here, as in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431–433, the asserted private remedy would unquestionably aid the "primary goal" of the statute. See *Cort*, *supra*, at 85.

I

Shareholders of a target corporation may be injured by a fraudulent tender offer in two quite different ways. They may exchange their shares for an inadequate consideration in reliance on the misrepresentation. Or they may retain their shares and be harmed by the fact that other shareholders were induced to surrender control to unworthy newcomers. The legislative history of § 14 (e) persuades me that Congress intended to protect the shareholders from both of these potential harms.[5] Since Chris-Craft claims to

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[5] In its discussion of the need for the legislation, the House Committee Report stated:

"The public shareholder must, therefore, with severely limited information, decide what course of action he should take. He has many alternatives. He can tender all of his shares immediately and hope they are all purchased. However, if the offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances, he will remain a shareholder in the company, under a new management which he has helped to install without knowing whether it will be good or bad for the company.

"The shareholder, as another alternative, may wait to see if a better offer develops, but if he tenders late, he runs the risk that none of his shares will be taken. He may also sell his shares in the market or hold them and hope for the best. Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision. He is forced to take a chance. For no matter what he does, he does it without adequate information to enable him to decide rationally what is the best possible course of action. This is precisely the kind of dilemma which our Federal securities laws are designed to prevent.

"The competence and integrity of a company's management, and of the persons who seek management positions, are of vital importance to stockholders. Secrecy in this area is inconsistent with the expectations of the people who invest in the securities of publicly held corporations and impairs public confidence in securities as a medium of investment. H. R. Rep. No. 1711, 90th Cong., 2d Sess., 2-3 (1968) (hereinafter House Report).

"It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check

have suffered the latter type of harm,[6] it has asserted a cause of action created by the statute.

Section 14 (e) was patterned after § 14 (a), which regulates

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on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." *Id.*, at 4.

[6] Chris-Craft's recovery included damages for the impaired value of its holdings, measured by the loss of the control premium its stock would have commanded but for the defendants' violations, and by the additional loss of value resulting from its position as a locked-in holder of an exceptionally large block. These elements of damages relate only to the stock actually owned by Chris-Craft and therefore are distinguishable from damages suffered in its capacity as a tender offeror which are measurable by the loss of the opportunity to exercise control. It is not correct to characterize these items of damages as related only to Chris-Craft's status as a tender offeror. See *ante*, at 36–37. On the contrary, any owner of an equally large block would lose the control premium that block could previously have commanded on the market, and would suffer a further loss if the company had passed into hostile hands. For instance, members of the Piper family could have claimed damages of this kind if they had remained shareholders in Piper and Chris-Craft had illegally gained control.

The Court suggests that Chris-Craft should be denied standing because the damages it seeks are "actually related *under these circumstances* to Chris-Craft's status as a contestant for control . . . ." *Ante*, at 36 (emphasis in original). The italicized phrase may be intended to imply that a shareholder who was not also a tender offeror *could* recover these items of damages. If so, the Court fails to explain why a tender offeror should be denied like relief. The congressional goal of neutrality with respect to tender offers would be impaired if persons holding large control blocks were granted greater rights than tender offerors who challenge their control.

On the other hand, the Court may mean that a shareholder's damages recovery may not include elements attributable to the size of its holdings. (The remainder of this paragraph of the opinion lends itself to this interpretation by distinguishing between "typical," or "ordinary" share-

proxy contests.[7] It is clear that a shareholder may recover in a suit under § 14 (a) even though he was not himself deceived by the misrepresentation.[8] I do not understand why § 14 (e) should receive any narrower construction.[9] At the very

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holders, and owners of large blocks.) This restriction on the damages recovery would be unsound. There is no reason to think that Congress would have intended anything less than a "make whole" remedy for shareholders. If I am correct that the purpose of the Williams Act was to protect the interests of shareholders, and others, in the integrity of the process of determining corporate control, see n. 5, *supra*, and *infra*, at 67–68, this kind of damages recovery could provide some measure of the value to the large shareholder of these interests.

[7] Both the Senate and the House Committee Reports refer to the cash tender offer as similar to a proxy contest.

[8] In *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, minority shareholders brought suit to set aside a merger on the ground that a proxy solicitation had been misleading. The suit was brought before the merger; obviously the plaintiffs were then aware of the misrepresentation, and in fact they voted against the merger, 403 F. 2d 429, 435 (CA7 1968), which was consummated despite their votes. This Court held that the minority shareholders were entitled to some relief, and while not specifying that relief, noted that "[m]onetary relief will, of course, also be a possibility." 396 U. S., at 388. If the defect in the proxy solicitation related to a term of the merger, an accounting could be ordered so that the shareholders would "receive the value that was represented as coming to them"; otherwise, monetary relief would be available "if the merger resulted in a reduction of the earnings or earnings potential of their holdings." *Id.*, at 388–389. This holding in *Mills* was consistent with the earlier statement in *J. I. Case Co.* v. *Borak*, 377 U. S. 426:

"The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group." *Id.*, at 432.

[9] The tender offer is just one species of solicitation that either an incumbent or an outside group may use in a contest for control of a corporation. Power to direct the destiny of the corporation may be obtained by acquiring proxies for a majority of the shares, by acquiring the shares themselves, or more typically by a combination of proxies and

least, the Court should allow all shareholders injured by a violation of § 14 (e) to assert a damages claim against the wrongdoer. Neither the extraordinary size of Chris-Craft's investment in Piper stock, nor the fact that the stock had been owned for only a few months, should deprive Chris-Craft of the right to assert a remedy available to the other members of the shareholder class which § 14 (e) was plainly designed to protect.

II

Even if we disregard Chris-Craft's stock ownership in Piper and focus only on its status as a tender offeror, it remains clear to me that its legal rights were invaded by the defendants' violation of § 14 (e). This conclusion is compelled by (a) a fair evaluation of the legislative purpose in the light of the rationale of *J. I. Case Co.* v. *Borak*, 377 U. S. 426; and (b) respect for the opinions of the Securities and Exchange Commission and the numerous federal judges who have recognized that § 14 (e) is little more than a restatement of Rule 10b–5 unless it has broadened the class of potential litigants who may challenge defective cash tender offers to include rival contestants for control as well as shareholders.

A

In *Borak* a unanimous Court held that the 1934 Act had implicitly authorized a shareholder to bring an action for rescission or damages for a violation of § 14 (a). Such a remedy was regarded as essential for the protection of investors[10] because practical considerations made it impos-

actual purchases. Section 14 broadly prohibits fraudulent solicitations, not merely to protect the individual shareholder from casting a misguided vote or from making an ill-advised sale, but more importantly to protect the corporate entity as a whole from the consequences of a vital decision procured by fraud.

[10] It is noteworthy that in the *Borak* opinion the Court consistently used the word "investors" rather than the word "shareholders" to describe the protected class.

sible for the SEC to enforce the proxy statement requirements completely and effectively.[11] This practical concern applies with even greater force to tender offers which are processed on a highly expedited schedule.[12]

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[11] "The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements. The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it. Indeed, on the allegations of respondent's complaint, the proxy material failed to disclose alleged unlawful market manipulation of the stock of [the American Tractor Corp.] and this unlawful manipulation would not have been apparent to the Commission until after the merger.

"We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U. S., at 432–433.

[12] "As initially introduced, the bill would have required the disclosure statement to be filed with the Securities and Exchange Commission 5 days before the tender offer was made to allow the staff of the Securities and Exchange Commission an opportunity to review the material for compliance with the applicable requirements. At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the

In both proxy and tender offer contests, the remedy which will most effectively deter violations of the statute is unquestionably the private damages action.[13] Under these circumstances, as the Court stressed in *Borak, supra*, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U. S., at 433.

If a private remedy must be implied to ensure full compliance with the statute, the remedy must be available to the litigants who are most vitally interested in effective enforcement. This is the essence of the *Borak* holding which was given emphasis by its quotation from *Deckert* v. *Independence Corp.*, 311 U. S. 282, 288:

> " 'The power *to enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the

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tender offer is first made to the public." S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967) (hereinafter Senate Report).

[13] In the passage from *Borak* set out in n. 11, the Court described the possibility of civil damages or injunctive relief as "a most effective weapon" in the enforcement of the Securities Exchange Act. The efficacy of enforcement of the antitrust laws and the Civil Rights Acts by "private attorneys general" rests on precisely this premise.

For example, we have stated that cases rejecting the *in pari delicto* defense,

"were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement." *Perma Mufflers* v. *International Parts Corp.*, 392 U. S. 134, 139.

exigencies of the particular case.'" 377 U. S., at 433–434 (emphasis in original).

The potential litigants who have the most to gain from enforcement of the statute—and the most to lose if its provisions can be ignored with impunity—are plainly the rival contestants. Surely the contestants are in a much better position—and have a much greater incentive—than a mere shareholder to detect and to challenge conduct prohibited by the Williams Act. Once one recognizes that Congress intended to rely heavily on private litigation as a method of implementing the statute, it seems equally clear that Congress would not exclude the persons most interested in effective enforcement from the class authorized to enforce the new law. Nor does it seem logical to assume that such authority would only reach actions brought for the benefit of the shareholders. It is fundamental in our adversary system that the selfish interest of the litigant provides the best guarantee that a claim will be effectively asserted.[14] I see no reason to deny incumbent management the right to recover for its own losses as well as for such injuries as the shareholders may have suffered. After all, those insiders are often the specific target of the conduct that the statute was enacted to regulate.[15]

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[14] This is the basis of the standing requirement in its constitutional aspect. See *Baker* v. *Carr*, 369 U. S. 186, 204. As one of the draftsmen of the 1934 Act put it, "there is no policeman so effective as the one whose pocketbook is affected by the degree to which he enforces the law." Stock Exchange Practices, Hearings on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., pt. 15, National Securities Exchange Act of 1934, p. 6518 (1934).

[15] Consider the following testimony by Senator Kuchel, who described himself as a coauthor of the legislation:

"The competence and integrity of management and controlling persons are of vital importance to stockholders. And yet, the prospective purchasers on a cash tender offer need not and often do not reveal their

If management is included within the protected class, an outside tender offeror has an equally strong argument for inclusion. For the legislative history also indicates that Congress was concerned about misconduct by insiders as well as outsiders. And just as management will most effectively challenge violations by the invader, so it is equally clear that a company committed to an attempt to acquire control of a target company will be the most zealous guardian of the shareholders' interests in having management comply with the law. I find ample evidence of congressional interest in fair competition between outsiders and insiders in making and opposing tender offers to shareholders of the target company. That evidence persuades me that both contenders are included within the class of persons protected by § 14 (e).[16]

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intentions, their commitments, or even their identities to the corporate shareholders. Not only is the shareholder prevented from making an informed investment decision, but both he and the corporation may easily become the unknowing victims of the so-called corporate raider.

"Today, there are those individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves.

"The tragedy of such collusion is that the corporation can be financially raped without the management or the shareholders having any knowledge of the acquisitions. Using the cash tender offer as a vehicle, the purchases can be made in so-called street names or, even more commonly, by Swiss banks for an undisclosed account number. The corporate raider may thus act under a cloak of secrecy in obtaining the shares needed to put him on the road to a successful capture and liquidation of the company." Hearings on S. 510 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 42–43 (1967).

[16] The use of terms such as "corporate raider" and "take-over pirate" in the argument of this case was misleading because they implied that the Williams Act was not intended to be neutral as between rival contestants for control. One thing that is abundantly clear from both the language of the statute and its legislative history is that the Act was *not* intended to tip the scales in favor of management.

B

The lower courts, along with the SEC, have consistently taken a broad view of standing under § 14 (e).

In the appeal on liability in this case, the SEC's *amicus* memorandum in the Second Circuit argued that "if a rival company in a contest for corporate control has no standing to sue for violations of the securities laws, enforcement of recent Congressional legislation to assure fairness in such struggles will be hampered . . . ." Memorandum of SEC as *Amicus Curiae* in No. 72–1064 (CA2), p. 12. In its brief before this Court, the SEC continues to insist that "[e]ven more necessary [than in *Borak*] are such private rights of action to supplement Commission actions to effectuate the Congressional purposes in enacting the Williams Act," Brief for SEC as *Amicus Curiae* 12. It devotes a full 55 pages of its brief to arguing that providing a private remedy in this case is necessary to insure enforcement of the Act and is consistent with the congressional intent. The SEC's expertise in the securities field, and its intimate involvement in the passage of the Act, entitle its views to respect.

The Courts of Appeals have also taken an expansive view of standing under § 14 (e). Shortly after § 14 (e) was passed, for example, Judge Friendly pointed out that the section's only possible addition to existing case law was its possible impact on standing, and indicated that both nontendering shareholders and the corporation have standing, *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F. 2d 937, 940–941, 946 (CA2 1969). Accord, *Smallwood* v. *Pearl Brewing Co.*, 489 F. 2d 579, 596 (CA5 1974). In another Second Circuit case, the court commented that § 14 (e) "should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not . . . in the position of a forced seller." *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F. 2d 787, 798–799 (1969). In the present case, while the Court of Appeals judges disagreed sharply on

several issues, there was agreement on standing. Judge Mansfield, in his separate opinion, explained:

> "The federal securities laws are silent on the subject of a private party's standing to sue. Indeed, neither § 14 (e) nor § 10 (b) or Rule 10b–5 state that purchasers, sellers, or exchangers of securities have the right to sue. However, their implied standing to sue has long since been judicially established . . . . I would recognize CCI's standing solely on the ground that vigorous enforcement of the anti-fraud provisions through private litigation . . . calls for similar implication of a private right of action in favor of a defeated contestant against the successful bidder for control for damages caused by the latter's violation of that section, . . . especially in view of our willingness to permit the target corporation to seek relief against the offeror under § 14 (e)." 480 F. 2d 341, 396 (CA2 1973). (Citations omitted.)

The First Circuit, relying heavily on these decisions, has also extended standing to obtain damages to tender offerors, *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F. 2d 421, 424–425 (1973), and the Fifth Circuit has cited them with apparent approval. *Smallwood* v. *Pearl Brewing Co.*, *supra*, at 596, and n. 20.[17]

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[17] We have been referred to two cases as restricting standing under § 14 (e): *Klaus* v. *Hi-Shear Corp.*, 528 F. 2d 225, 232 (CA9 1975); *Sargent* v. *Genesco, Inc.*, 492 F. 2d 750 (CA5 1974). In both cases, however, there was no harmful misrepresentation to the protected shareholders. Hence, as the *Sargent* court noted, the issue was not "whether these plaintiffs were appropriate plaintiffs to enforce the duties created by [§] 14 (e)," but rather, whether those duties were violated. *Id.*, at 770 n. 28. In *Klaus*, it was the tender offeror who was misled. 528 F. 2d, at 232.

The commentators have supported the expansive view of standing under § 14 (e). See, *e. g.*, Bromberg, The Securities Law of Tender Offers, 15 N. Y. L. F. 459, 554 (1969); Hamilton, Some Reflections on Cash Tender Offer Legislation, 15 N. Y. L. F. 269, 291–292 (1969); Note,

III

Petitioners view *Cort* v. *Ash*, 422 U. S. 66, as foreclosing standing in this case because tender offerors do not belong to the "especial class" Congress intended to benefit. I am convinced, however, that the controlling authority is not *Cort*, but *J. I. Case Co.* v. *Borak*, *supra*. In *Borak*, the Court held that a derivative suit on behalf of the corporation could be brought under § 14 (a), see 377 U. S., at 431, although it seems clear that the primary beneficiaries of that section were individual stockholders rather than corporations. Thus, *Borak* itself does not meet the majority's "especial class" test.[18] But *Cort* carefully distinguished *Borak* on grounds that apply equally to this case. In this case, as in *Borak*, there is "at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone," *Cort*, 422 U. S., at 79; see *id.*, at 79 n. 11; there is a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard," *id.*, at 82; the private remedy is necessary to effectuate the congressional goal, *id.*, at 84; and that goal will accordingly be hindered if the plaintiff is relegated to an inadequate state remedy, *id.*, at 85. Thus, in the kind of situation presented by

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Chris-Craft and Loss of Opportunity to Control: The Lost Opportunity, 43 Ford. L. Rev. 820, 821 (1975); Comment, Remedies for Defrauded Tender Offerors Under Section 14 (e) of the Securities Exchange Act of 1934, 62 Geo. L. J. 1693, 1695–1696 (1974); Note, Cash Tender Offers, 83 Harv. L. Rev. 377, 398–399 (1969); Comment, Tender Offers: The Liberalization of Standing Requirements Under Section 14 (e), 7 U. San Fran. L. Rev. 561 (1973).

[18] The Court reads *Borak* as though it merely sustained class relief on behalf of all shareholders. *Ante*, at 32–33, and n. 21. The *Borak* opinion itself, however, is explicit in its holding that "a right of action exists as to both derivative and direct causes." 377 U. S., at 431. Even under the Court's interpretation of *Borak* as protecting *all* shareholders, I do not understand today's holding that only *some* Piper shareholders are protected—*i. e.*, "ordinary" shareholders as opposed to holders of large blocks.

Borak and this case, *Cort* does not require that the plaintiff belong to the "especial class" as one of four relevant factors to be considered; nowhere does it say that this factor is essential. And in discussing this factor, the Court suggested the existence of a "pervasive legislative scheme" as an alternative to an "articulated federal right in the plaintiff," *id.*, at 82. I conclude that *Cort* does not bar Chris-Craft's action, and that *Borak* remains a viable precedent. As shown in Part II–A, *supra*, *Borak* compels a holding that Chris-Craft has standing.

The "especial class" argument, besides being based on a misreading of *Cort* and *Borak*, is also based on the mistaken belief that congressional desire to protect shareholders is in some way inconsistent with providing tender offerors with a right to damages.

It is true that Congress was deeply concerned about the individual stockholder faced with a tender offer. Congress did not, however, view this shareholder's interest as being distinct from the interests of others affected by his decision. As noted in the discussion of Chris-Craft's standing as a shareholder, Congress also intended to protect those who would remain shareholders after the successful tender offer, *supra*, at 56–57, n. 5; see also *supra*, at 62–63, n. 15. Like these shareholders, the participants in the tender contest were seen as having an interest in the integrity of the process. Senator Williams, in explaining the purposes of the bill, stated:

> "I have taken extreme care with this legislation to balance the scales equally *to protect the legitimate interests of the corporation, management, and shareholders* without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders *while at the same time providing the offeror and management*

equal opportunity to fairly present their case.[19] Experience . . . has amply demonstrated that the disclosure requirements of the Federal securities acts are an aid to legitimate business transactions, not a hindrance." 113 Cong. Rec. 854–855 (1967) (emphasis added).

"[This bill will put all on] an equal footing with respect to the availability of significant facts about a tender offer . . . . All will be able to deal in the securities markets knowing that all of the pertinent facts are available." *Id.*, at 856.

Indeed, protection of tender offerors is not only consistent with protection of shareholders. It is also indispensable to protecting shareholders. Individual shareholders often lack the capacity to litigate these cases effectively. Few indeed could afford to pursue the course Chris-Craft has taken of hiring counsel with experience in complex litigation of this kind to litigate through a preliminary injunction, discovery, trial on liability, another trial on damages, three appeals to the Second Circuit, including an en banc, and three petitions to this Court. Thus, the most realistic deterrent to fraud on shareholders is a damages suit brought by the opposition in the tender contest. Moreover, disallowing such suits creates an incentive to violate the Act in retaliation for violations by the other side. When no effective judicial remedy is available, self-help is more attractive. Finally a damages remedy for the tender offeror is necessary for the protection of one particular class of shareholders: those shareholders of target corporations who accept an exchange offer and thereby become shareholders of the tender offeror. In the instant case, 112,089 Piper shares were tendered to Chris-Craft as part of an exchange offer effective July 24. The tendering shareholders took the risk that Chris-Craft might lose in a fair tender con-

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[19] This language is also found in both the House and Senate Reports. House Report 4; Senate Report 3.

test. But they did not assume the risk that Bangor Punta would illegally deprive Chris-Craft of its opportunity to gain control. These shareholders are certainly within the especial class § 14 (e) was intended to protect. Only by making Chris-Craft whole can the expectations of these shareholders be vindicated.[20]

Petitioners' answer to all this is that an award of damages to Chris-Craft would harm the former Piper shareholders who exchanged their stock for Bangor Punta stock. This answer is unsatisfactory for three reasons. First, I am unpersuaded that the federal courts are incapable of structuring the remedy to avoid this problem. See *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F. 2d 421, 425 (CA1 1973). Second, in many cases the problem will not arise, either because the size of the judgment will be small in relation to the defendants' assets, or because most or all of the tendering shareholders will have sold their stock by the time of the judgment. Third, the argument provides no basis for distinguishing between private plaintiffs. Any monetary recovery against Bangor Punta by any plaintiff potentially decreases the value of Bangor Punta's stock.[21]

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[20] Because the injury to these shareholders "ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder," *Borak*, 377 U. S., at 432, it would be only a slight extension of *Borak* to allow these shareholders to bring a derivative action on behalf of Chris-Craft. Cf. *id.*, at 432–433. I would also allow Chris-Craft to bring the action.

[21] Petitioners' argument would thus bar a suit by a person who had tendered a large number of shares to Bangor Punta, since a recovery on his behalf could injure other former Piper shareholders. It would also bar one of the remaining public shareholders in Piper from suing, either in his own behalf or on behalf of Piper, for Bangor Punta's illegal acquisition of control. Likewise, it would bar suit by a Piper shareholder who exchanged his stock for Chris-Craft stock, in the reasonable and legally protected expectation that Chris-Craft would have a fair opportunity to acquire control of Piper. Petitioners' argument simply cuts too far.

In sum, in my judgment the disposition of the standing issue by the Court of Appeals for the Second Circuit was consistent with this Court's prior decisions as well as the unanimous view of other Circuits. The fact that error may have been committed in this litigation in the consideration of the liability and damages issues—or might be committed in other cases—should not be permitted to color the analysis of the threshold standing issue. On that issue—unless the basic policy of construing securities legislation liberally to protect investors, which motivated this Court's decisions in this area of the law for decades, is to be repudiated—a fair evaluation of the statute requires affirmance.

Since the Court does not address the other questions presented by the certiorari petitions, neither shall I. I must, however, register my additional dissent from the Court's action in volunteering to decide—and in deciding incorrectly—a question not raised by the parties. The Court's reversal of the injunction entered by the District Court pursuant to the direction of the Court of Appeals is, as far as I can determine, totally unprecedented.

I frankly do not understand the reasoning which leads the Court to conclude that the injunction was "premised" upon the damages award. *Ante*, at 47. The injunction was an independent remedy premised on the violations of law found by the lower courts. Setting aside the damages recovery provides an *additional* reason for permitting the injunction to remain in effect; surely that action does not logically support the conclusion that there should be no remedy whatsoever for violations which the Court assumes, *arguendo*, were properly proved.

My reading of the relevant portions of the record do not persuade me that Chris-Craft made a binding election to waive any right to equitable relief,[22] particularly since it

[22] The only material in the record which I have been able to locate and

must be kept in mind that all parties had assumed that a damages remedy was available.[23] If there has been any relevant waiver, it is by the petitioners who did not challenge

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which is relevant to this issue is the following colloquy from a pretrial conference on September 25, 1970:

"MR. LIMAN: That has nothing to do with us, your Honor. I am speaking of Chris-Craft. I think that the argument was made that they shouldn't have to pay this woman in part because we were seeking to enjoin them here [the record does not contain the complete transcript and it is unclear what this refers to], but in the light of the way in which they have managed this company for a year I'm not seeking injunctive relief here. It wouldn't do me any good here to get back Piper. I am seeking damages. As to that I don't think I have anything to do with this case now. You can pay that woman as far as I am concerned.

"MR. RYAN: Do I understand that to be an irrevocable position, Mr. Liman?

"MR. LIMAN: You can understand that I am seeking damages here." App. in No. 72–1064 (CA2), p. 1105A.

Two pages later, the following exchange took place:

"THE COURT: I thought that you wanted them to rescind 112,000 shares, the 112,000 share transaction.

"MR. LIMAN: I want money now, your Honor.

"THE COURT: I know you say that now. But the papers up to this point, and in the Court of Appeals talked about having Bangor Punta give back the 112,000 shares or tender or rescind.

"MR. LIMAN: Not these shares that were involved here. The shares they got in the exchange offer, yes, your Honor. And at that time Piper was worth getting. But we lost that injunction to keep them from exercising control over Piper and they have consolidated their position, and I just don't think, with all the powers that this Court has, you could give effective injunctive relief that would put me in the position that I should have been in in August of 1969. That's why money is the only thing that is left. . . ." *Id.*, at 1106A–1107A.

The position taken by Chris-Craft's counsel in the Court of Appeals was as follows:

"It is very difficult to conceive of how we can be put in a position to ever compete with Bangor Punta for control again particularly since they owned the swing blocks. If we were directed to sell them as the seller,

[*Footnote 23 is on p. 72*]

the injunction in this Court.[24] In reaching out to decide this unargued question, the Court takes a liberal view of the "plain error" doctrine which I consider unacceptable.

Accordingly, without explaining my views about the issues not decided by the Court,[25] I respectfully dissent from its judgment.

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they could afford to buy them at any price since they were buying their own stock.

"So there were such practical difficulties in attempting to work out an equitable decree after two years in a frozen out minority position that a relief in which they were told paid for the shares now, 'You have done everything else to them,' seemed to be the most appropriate.

"However, if for any reason we are told that money damages are not appropriate in this case then we need equitable relief of some sort that will restore us to what we had lost the opportunity to do, which was, namely, control of Piper." Tr. of Oral Arg. in No. 72–1064 (CA2), p. 9. Somewhat later in argument, counsel repeated:

"I think that there is equitable relief that could be fashioned. Bangor Punta could be enjoined from voting the controlled shares. That would have the effect of putting Chris-Craft in a controlling position and they, of course, object very much to that." *Id.*, at 16.

[23] In its memorandum in opposition to Chris-Craft's motion for a preliminary injunction, Bangor Punta made this statement, pp. 24–25: "Even assuming Chris-Craft can prove the allegations in its moving papers at a full trial after Bangor Punta has had the opportunity of properly preparing itself for trial, a money judgment will fully compensate Chris-Craft for any damages it allegedly suffered because the Public holders of the 107,574 shares elected to go with Bangor Punta."

[24] Indeed, counsel for Bangor Punta expressly stated at oral argument that a tender offeror's standing to seek injunctive relief under § 14 (e) was unchallenged. Tr. of Oral Arg. 12.

[25] On the issue of causation, I would simply note that Chris-Craft's recovery includes elements of damages which were not dependent on proof that it would have acquired actual control but for petitioners' violations. And I should also note that I would not affirm the Court of Appeals' calculation of the total damages award.

Syllabus

DELAWARE TRIBAL BUSINESS COMMITTEE ET AL. *v.* WEEKS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 75–1301. Argued November 10, 1976—Decided February 23, 1977*

The Delaware Indians, who originally resided in the Northeastern United States, were gradually forced to move westward in the 19th century, and the tribe became geographically scattered. One group (the Cherokee Delawares), which initially had settled on a Kansas reservation as part of the tribe's main body, eventually moved to "Indian Country" in Oklahoma, became assimilated with the Cherokees, and is today a federally recognized tribe. Another group (the Absentee Delawares), which never joined the main body in Kansas, but migrated to Oklahoma and settled with the Wichita and Caddo Indians, is also a federally recognized tribe. A third group (the Kansas Delawares) lived with the main body on the Kansas reservation, but remained in Kansas when the Cherokee Delawares moved to Oklahoma; under an 1866 treaty the Kansas Delawares elected to become United States citizens and to receive individual parcels of land in Kansas on condition that they dissolve their relationship with the tribe and participate in tribal assets only to the extent of a "just proportion" of the tribe's credits "then held in trust by the United States," and the descendants of this group are not a federally recognized tribe. The question presented by this litigation is whether the Kansas Delawares were denied equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment because they were excluded from the distribution of funds authorized by an Act of Congress, which provided for distribution of funds only to the Cherokee and Absentee Delawares pursuant to an award by the Indian Claims Commission to redress a breach by the United States of an 1854 treaty with the Delaware Tribe. *Held:*

1. The plenary power of Congress in matters of Indian affairs does not mean that an equal protection challenge to the instant distribution statute is not justiciable. "The power of Congress over Indian affairs

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*Together with No. 75–1335, *Absentee Delaware Tribe of Oklahoma Business Committee et al.* v. *Weeks et al.*, and No. 75–1495, *Andrus, Secretary of the Interior, et al.* v. *Weeks et al.*, also on appeal from the same court; and No. 75–1328, *Weeks et al.* v. *Andrus, Secretary of the Interior, et al.*, also on appeal from the same court but not argued. See n. 16, *infra*.

may be of a plenary nature; but it is not absolute." *United States* v. *Alcea Band of Tillamooks*, 329 U. S. 40, 54. The appropriate standard of judicial review is that the legislative judgment should not be disturbed "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *Morton* v. *Mancari*, 417 U. S. 535, 555. Pp. 83–85.

2. The exclusion of the Kansas Delawares from distribution under the Act does not offend the Due Process Clause of the Fifth Amendment, since on the record such exclusion was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Pp. 85–89.

(a) The Kansas Delawares, not being a recognized tribal entity, are simply individual Indians with no vested rights in any tribal property, such as is distributed by the Act. As tribal property, the appropriated funds were subject to Congress' exercise of its traditional broad authority over the management and distribution of property held by recognized tribes, an authority "drawn both explicitly and implicitly from the Constitution itself," *Morton* v. *Mancari*, *supra*, at 551–552. Pp. 85–86.

(b) An earlier exclusion of the Kansas Delawares from participation in tribal assets in another Act settling claims of the Delaware Tribe, while not of itself legitimating their exclusion from the Act in question, nevertheless indicates that Congress has historically distinguished them from the Cherokee Delawares in distributing tribal awards. Pp. 86–87.

(c) It appears from the legislative history of the Act in question that Congress deliberately limited the distribution under the Act to the Cherokee and Absentee Delawares tc avoid undue delay, administrative difficulty, and potentially unmeritorious claims, and this congressional choice is rationally supported, even though based on an unrelated experience in ignorance of the effect of the limitation of the distribution on the Kansas Delawares. Pp. 87–89.

406 F. Supp. 1309, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined and in Parts I and II of which BURGER, C. J., and BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the result, in which BURGER, C. J., joined, *post*, p. 90. STEVENS, J., filed a dissenting opinion, *post*, p. 91.

George B. Christensen argued the cause for appellants in No. 75–1301. With him on the briefs were *Joseph Fontana*

and *Bruce Miller Townsend. Bernard J. Rothbaum, Jr.*, argued the cause and filed briefs for appellants in No. 75–1335. *Deputy Solicitor General Randolph* argued the cause for appellants in No. 75–1495. With him on the brief were *Solicitor General Bork, Assistant Attorney General Taft, Kenneth S. Geller, Edmund B. Clark,* and *Edward J. Shawaker.*

Delmar L. Stagner argued the cause for appellees in all cases. With him on the brief was *Stephen P. Friot.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

An Act of Congress providing for distribution of funds to certain Delaware Indians, pursuant to an award by the Indian Claims Commission to redress a breach by the United States of an 1854 treaty, is challenged in this action by a group of Delawares excluded from the distribution. The question presented by this litigation is whether their exclusion denies them equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment.[1]

I

A brief history of the migrations of the Delaware Indians will serve as a helpful backdrop to the litigation.[2] The Delawares originally resided in the Northeastern United States, in what are now southern New York, New Jersey, part of Pennsyl-

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[1] Fifth Amendment equal protection claims are cognizable under the Amendment's Due Process Clause. *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976).

[2] A more detailed narrative of the Delawares' history and westward migrations may be found in *Delaware Tribe of Indians* v. *United States*, 2 Ind. Cl. Comm. 253, 255–261 (1952), and in the opinion of the District Court below, *Weeks* v. *United States*, 406 F. Supp. 1309 (WD Okla. 1975). See also S. Rep. No. 1518, 90th Cong., 2d Sess., 7–12 (1968); C. Weslager, The Delaware Indians (1972); M. Wright, A Guide to the Indian Tribes of Oklahoma 145–155 (1977).

vania, and part of Delaware. The Munsee Indians, related to the Delawares, resided in the northern part of that area. Under pressure from new settlers, both the Delawares and the Munsees were gradually forced to move westward, and by 1820 they were geographically scattered. During the trek westward the main branch of the Delawares stopped for varying lengths of time in what are now Ohio, Indiana, and Missouri, while others went to Arkansas, Oklahoma, and Texas. In 1818, the Delawares in Indiana ceded their lands in that State to the United States in return for a promise of land west of the Mississippi River.[3] The Delawares then moved to Missouri for a short time, but under an 1829 "supplementary article" to the 1818 treaty, were again moved to what they were told would be their permanent residence on a reservation in Kansas.[4] The establishment of this reservation was purportedly the fulfillment of the promise made in the 1818 treaty to provide western land in return for their agreement to leave their Indiana lands.

Some Delawares, however, never joined the main body of the Delawares on the Kansas reservation. Among these was a small group that migrated to Oklahoma and settled with the Wichita and Caddo Indians. For a time during the 1850's and 1860's, the Delawares in Kansas expected this group to rejoin the main body of the tribe there, but these Indians, called the "Absentee Delawares" in this suit, stayed with the Wichitas and Caddos.[5] Their descendants

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[3] Treaty of 1818, 7 Stat. 188.

[4] Treaty of 1829, 7 Stat. 327.

[5] Article IV of the Treaty of 1860 between the United States and the main body of the Delawares, 12 Stat. 1330, provided:

"Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return . . . ."

have remained in Oklahoma through the present day, and are a federally recognized Indian tribe.[6]

By the 1850's, the main body of the Delaware Nation, together with a small number of Munsees, had assembled on the "permanent" reservation in Kansas at the confluence of the Kansas and Missouri Rivers. But the hope that the Kansas reservation would be the Delawares' last stopping place was short-lived. In 1866, the Delawares living on the reservation signed a treaty, under which they were to move to "Indian Country" in Oklahoma to live with the Cherokees.[7] Each Delaware moving to Indian Country and enrolling on the proper register was to receive a life estate of 160 acres of Cherokee land and the right to become a member of the Cherokee Nation. Most of the Delawares on the Kansas reservation accepted these conditions and moved to Oklahoma, where they were gradually assimilated for most purposes into the Cherokee Nation, and were permitted to share equally with the Cherokees in the general funds of that tribe. See, *e. g., Delaware Indians* v. *Cherokee Nation,* 193 U. S. 127 (1904); *Cherokee Nation* v. *Journeycake,* 155 U. S. 196 (1894). Despite their association with the Cherokees, these Indians, called "Cherokee Delawares" in this suit, have over the years maintained a distinct group identity, and they are today a federally recognized tribe.[8]

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[6] The formal name of the Absentee Delawares is the Absentee Delaware Tribe of Western Oklahoma. Appellees concede that the Absentee Delawares are a federally recognized tribe. Jurisdictional Statement in No. 75–1328, p. 20.

[7] Treaty of 1866, 14 Stat. 793.

[8] The formal name of the Cherokee Delawares is the Delaware Tribe of Indians. Appellees contend that the Cherokee Delawares were not a federally recognized tribe until after the commencement of this lawsuit. Tr. of Oral Arg. 58–59. The District Court made no finding as to the Cherokee Delawares' status as a recognized tribe, but it is clear that Congress, prior to the enactment of the statute, had dealt with the

The 1866 treaty did not require all Delawares on the Kansas reservation to move to Oklahoma. Rather, the treaty provided that any Delawares who agreed to "dissolve their relations with their tribe" and become citizens of the United States might elect to remain in Kansas. Such Delawares would receive 80 acres of land in Kansas in fee simple and a "just proportion" of the tribe's credits "then held in trust by the United States," but thereafter could not "further participate in their [tribal] councils, nor share in their property or annuities." [9] Twenty-one adult Delawares chose to accept these conditions and remain in Kansas.[10] Their descendants, called "Kansas Delawares" in this suit, are not a federally recognized tribe.[11]

In 1854, while they still lived on the Kansas reservation, the main body of the Delawares signed a treaty with the

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Cherokee Delawares as a distinct entity. See, *e. g.*, Act of 1904, § 21, 33 Stat. 222, providing for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . ."; 43 Stat. 812; 44 Stat. 1358; and 49 Stat. 1459, amending 43 Stat. 812.

[9] 14 Stat. 793, Arts. III, IX.

[10] These 21 adults had 49 children who, under the terms of the 1866 treaty, were permitted to elect for themselves upon attaining majority whether to join the Delawares who had moved to the Cherokee Nation. Under an 1874 treaty, however, the minor children were all granted citizenship in the United States, and were granted land on the same terms as their parents. 18 Stat. 146, 175. The District Court found that the 1874 treaty eliminated the necessity for an election by the children. 406 F. Supp., at 1320.

[11] Appellees stated at oral argument in this Court that a Kansas Delaware, Mr. Joe Bartles, was prominently involved in prosecuting the Delawares' claims before the Indian Claims Commission, that two Kansas Delawares had served as members of the (Cherokee) Delaware Tribal Business Committee, and that the Business Committee in 1952 adopted a resolution recognizing a number of Kansas Delawares as entitled to share in Delaware lands. Tr. of Oral Arg. 59–61. There were apparently no Kansas Delawares on the Business Committee during Congress' deliberations on the statute to distribute the award to redress the breach of the 1854 treaty.

United States under which the United States was to sell certain reservation tribal "trust" lands at public auction. In 1856 and 1857, the United States breached the treaty by selling the lands privately and not at public auction. Approximately 100 years later, the Cherokee and Absentee Delawares brought separate but identical claims before the Indian Claims Commission arising out of this breach of the 1854 treaty. The Commission found that the two groups were "entitled jointly to represent the entire Delaware Tribe," *Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 344, 345 (1969), citing *Delaware Tribe* v. *United States*, 2 Ind. Cl. Comm. 253 (1952), aff'd as to parties, 130 Ct. Cl. 782, 128 F. Supp. 391 (1955), and determined that the private sales of the trust lands had realized $1,385,617.81 less than would have been realized for the tribe at public auction. The Commission awarded the tribe that sum plus interest, or a total of $9,168,171.13.[12] 21 Ind. Cl. Comm., at 369–370. Congress appropriated funds to pay the award and later enacted Pub. L. 92–456 providing for its distribution.[13]

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[12] It is not disputed that the credits "then held in trust by the United States" which were distributed proportionately to the Kansas Delawares under the 1866 treaty included the amount received by the United States when it sold the trust lands privately rather than at public auction. We may assume that compliance by the United States with its promise to sell the lands at public auction would have meant that the sum paid to each Kansas Delaware who bought out of the tribe would have been larger.

[13] Pub. L. 92–456, 86 Stat. 762, is codified in 25 U. S. C. §§ 1291–1297 (1970 ed., Supp. V) as follows:

§ 1291:

"The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such

The statute limited distribution to the Cherokee and Absentee Delawares, with amounts payable determined under a formula provided in 25 U. S. C. § 1294. Ten percent of the

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expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections."

§ 1292:

"The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

"(a) they were born on or prior to and were living on October 3, 1972; and

"(b) they are citizens of the United States; and

"(c)(1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

"(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary."

§ 1293:

"All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant."

§ 1294:

"(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292 (c)(2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The

total sum was to be set aside for the two tribal bodies, and was to be retained by the United States to the credit of the tribes, to be used in ways approved by the Secretary

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funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292 (c)(2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

"(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292 (c)(1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided*, That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members."

§ 1295:

"Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons."

§ 1296:

"None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes."

§ 1297:

"The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title."

of the Interior. The remaining 90% was to be divided among Cherokee Delawares whose names appeared on a "per capita payroll" described in § 1292 (c)(1), and among Absentee Delawares whose names appeared on a "constructed base census roll" described in § 1292 (c)(2).[14]

Appellee Weeks, on behalf of all the Kansas Delawares, instituted this action against the United States, the Cherokee Delawares, the Absentee Delawares, and the Secretary of the Interior in the District Court for the Western District of Oklahoma, alleging that the exclusion of the Kansas Delawares from the distribution of the award constituted a denial of the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment. A three-judge court was convened.[15] The court declared, one judge dissenting, that Congress' failure to include the Kansas Delawares among those entitled to share in the award under Pub. L. 92–456 violated the Due Process Clause. The court also enjoined the Secretary of the Interior from distributing any of the appropriated funds pending amendment of the distribution provisions of the statute, or enactment of further legislation providing for distribution of the funds. *Weeks* v. *United States*, 406 F. Supp. 1309, 1346–1347 (1975). Each defendant separately appealed to this Court, the Secretary of the Interior in No. 75–1495, the Cherokee Delawares in No. 75–1301, and the Absentee Delawares in No. 75–1335. We

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[14] So defined, Cherokee Delawares eligible to share in the distribution must necessarily be members of the tribal entity as presently constituted. Absentee Delawares eligible to share in the award, on the other hand, are defined somewhat more broadly, so that some nonmembers of the tribe are eligible under the statute.

[15] A similar action in the District Court for the Northern District of Oklahoma was consolidated with appellee Weeks' suit in the District Court below, and the appeals to this Court are from the decision in the consolidated cases.

noted probable jurisdiction of the three appeals, 426 U. S. 933 (1976). We reverse.[16]

II

Appellants differ on the issue of whether this suit presents a nonjusticiable political question because of Congress' pervasive authority, rooted in the Constitution, to control tribal property. Stated in other words, they differ on the issue of whether congressional exercise of control over tribal property is final and not subject to judicial scrutiny, since the power over distribution of tribal property has "been committed by the Constitution" to the Congress, *Baker* v. *Carr*, 369 U. S. 186, 211 (1962), and since "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," *id.*, at 210. Appellants Cherokee and Absentee Delawares, citing *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), argue that Congress' distribution plan reflects a congressional determination not subject to scrutiny by the Judicial Branch, and that the District Court therefore erred in reaching the merits of this action. Appellant Secretary of the Interior, on the other hand, submits that the plenary power

[16] The United States, also joined as a party defendant, was dismissed from the suit on the ground that it had not consented to the action. No appeal was taken to this Court from that dismissal.

Appellees also filed an appeal from the District Court judgment which is pending as *Weeks* v. *Andrus*, No. 75–1328. Their complaint asserted that 25 U. S. C. §§ 1181–1186 (relating to the 1818 treaty) and §§ 1291–1297 (1970 ed., Supp. V) (relating to the 1854 treaty) violated the Fifth Amendment's Due Process and Just Compensation Clauses; §§ 1181–1186, because the Cherokee Delaware class was wrongfully included in the proposed distribution under that statute; and §§ 1291–1297, because the Kansas Delaware class was wrongfully excluded and the Cherokee and Absentee Delaware classes wrongfully included in that statute's distribution. The District Court held that neither statute was unconstitutional by reason of the inclusion of the Cherokee Delaware and the Absentee Delaware classes. It is from this aspect of the District Court's decision that the appeal in No. 75–1328 is taken. In light of today's decision, the judgment of the District Court in that respect is affirmed.

of Congress in matters of Indian affairs "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny or that claims, such as those presented by [appellees], are not justiciable." Brief for Appellants in No. 75–1495, p. 19 n. 19. We agree with the Secretary of the Interior.

The statement in *Lone Wolf, supra,* at 565, that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties, see generally *Antoine* v. *Washington,* 420 U. S. 194, 201–204 (1975), has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, *e. g., Morton* v. *Mancari,* 417 U. S. 535 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40, 54 (1946) (plurality opinion); see also *United States* v. *Creek Nation,* 295 U. S. 103, 109–110 (1935); cf. *United States* v. *Jim,* 409 U. S. 80, 82 n. 3 (1972).

The question is therefore what judicial review of Pub. L. 92–456 is appropriate in light of the broad congressional power to prescribe the distribution of property of Indian tribes. The general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determination of what is the best or most efficient use for which tribal funds should be employed. *Sizemore* v. *Brady,* 235 U. S. 441, 449 (1914). Thus, Congress may choose to differentiate among groups of Indians in the same tribe in making a distribution, *Simmons* v. *Seelatsee,* 384 U. S. 209 (1966), aff'g 244 F. Supp. 808 (ED Wash. 1965), or on the other hand to expand a class of tribal beneficiaries entitled to share in royalties from tribal lands, *United States* v. *Jim,*

supra, or to devote to tribal use mineral rights under allotments that otherwise would have gone to individual allottees, *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649 (1976). The standard of review most recently expressed is that the legislative judgment should not be disturbed "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." *Morton* v. *Mancari*, *supra*, at 555.

III

We are persuaded on the record before us that Congress' omission of the appellee Kansas Delawares from the distribution under Pub. L. 92–456 was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

First, the Kansas Delawares are not a recognized tribal entity, but are simply individual Indians with no vested rights in any tribal property. Public Law 92–456 distributes tribal rather than individually owned property, for the funds were appropriated to pay an award redressing the breach of a treaty with a tribal entity, the Delaware Nation. It was that tribal entity, represented jointly in the suit before the Indian Claims Commission by the appellants Cherokee Delawares and Absentee Delawares, that suffered from the United States' breach, and both the Commission award and the appropriation by Congress were the means of compensating that tribal entity for the wrong done to it. Indeed, the Indian Claims Commission is not empowered to hear individuals' claims, but may only adjudicate claims held by an "Indian tribe, band, or other identifiable group." 25 U. S. C. §§ 70a, 70i; see *Minnesota Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 270–271, 315 F. 2d 906, 913–914 (1963). As tribal property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes, an authority "drawn both explicitly and implicitly from the Constitution itself." *Morton* v. *Mancari*,

supra, at 551–552. This authority of Congress to control tribal assets has been termed "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . . ." F. Cohen, Handbook of Federal Indian Law 94, 97 (1942).

The ancestors of the Kansas Delawares severed their relations with the tribe when they elected under the 1866 treaty to become United States citizens entitled to participate in tribal assets only to the extent of their "just proportion . . . of the cash value of the credits of said tribe . . . *then* held in trust by the United States." (Emphasis supplied.) We cannot say that the decision of Congress to exclude the descendants of individual Delaware Indians who ended their tribal membership and took their proportionate share of tribal property as constituted more than a century ago, and to distribute the appropriated funds only to members of or persons closely affiliated with the Cherokee and Absentee Delaware Tribes, was not "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Second, the exclusion of the Kansas Delawares under Pub. L. 92–456 was not their first exclusion from participation in a distribution of tribal assets. In 1904 Congress appropriated $150,000 to settle claims of the Delaware Tribe of Indians, one of them arising out of another injustice done to the Delawares under the 1854 treaty, unrelated to the breach which forms the basis for the distribution under Pub. L. 92–456.[17] See *United States* v. *Delaware Tribe of Indians*, 192 Ct. Cl. 385, 403–405, 427 F. 2d 1218, 1229–1230 (1970). The 1904 Act directed the Secretary of the Treasury to pay the settlement to the tribe known in this suit as the Cherokee Delawares "as said tribe shall in council direct," thereby excluding both

[17] The claims had been brought by the Cherokee Delawares under a 1902 Act, 32 Stat. 716, 726, which, *inter alia*, gave jurisdiction to the Court of Claims to hear claims brought by the "Cherokee tribe, or any band thereof . . . against the United States."

Absentee and Kansas Delawares. 33 Stat. 189, 222. This distribution was limited to the Cherokee Delawares although it was compensation, *inter alia*, for a wrong to the Delawares in 1854, before the Kansas Delawares split off from the tribe. Some Kansas Delawares unsuccessfully sought to participate in the distribution but, as noted by the District Court in this case, "were denied participation on grounds similar to some of those argued in the present case." 406 F. Supp., at 1321 n. 15. The Comptroller of the Treasury concluded that "[m]anifestly [the Kansas Delawares] were not entitled to participate in the distribution of annuities or other funds due or belonging to the Delaware tribe" for:

> "The provision in the [A]ct of April 21, 1904, *supra*, authorizes and directs payment to the 'Delaware *tribe* of Indians residing in the Cherokee Nation, as said *tribe* shall in council direct' . . . . The proviso immediately following the appropriation in the [A]ct emphasizes the clear indication that the appropriation was made for the tribe as distinguished from the Delaware Indians who had severed their tribal relations and become citizens of the United States." 11 Comp. Dec. 496, 500 (1905) (emphasis in original).

While this precedent of excluding the Kansas Delawares from the 1904 distribution does not of itself legitimate their exclusion from the present distribution statute, their earlier exclusion nevertheless indicates that Congress has historically distinguished them from the Cherokee Delawares in distributing an award based in part on a breach of the very treaty involved in this litigation.

Third, Congress deliberately limited the distribution under Pub. L. 92–456 to the Cherokee and Absentee Delawares because of substantial problems it apprehended might attend a wider distribution. H. R. 5200, the bill originally introduced to distribute the funds, had contained a "catchall" clause authorizing distribution "to include the names of all

persons born on or prior to and living on the date of this Act who are lineal descendants of members of the Delaware Tribe as it existed in 1854 . . . ." [18] This catchall would have been analogous to a clause in a 1968 statute distributing funds to compensate the Delaware Tribe for the United States' inadequate payment to them when they were moved off their Indiana lands in 1818.[19] Under the 1968 catchall clause, all lineal descendants of the tribe as it existed in 1818 were permitted to share in the distribution, 25 U. S. C. § 1181 (d), and about 300 Kansas Delawares were thereby allowed to participate in the distribution of the award redressing the 1818 wrong.

The omission of the catchall provision from Pub. L. 92–456, as finally enacted, followed legislative hearings at which the Cherokee and Absentee Delawares testified. At these hearings they directed Congress' attention to problems that had arisen when Munsee Indians, in addition to the Kansas Delawares, had claimed eligibility under the catchall provision of the 1968 statute.[20] Because of a dispute over the eligibility of the Munsees to participate under the catchall clause, there had been inordinate delays in the distribution of the funds. Indeed, as late as 1972 many of the Munsees' claims

[18] H. R. 5200, 92d Cong., 1st Sess., 2 (1971); S. 1067, 92d Cong., 1st Sess., 2 (1971).

[19] 82 Stat. 861, 25 U. S. C. §§ 1181–1186. The constitutionality of this statute was also challenged by appellees in the District Court. See n. 16, *supra*.

[20] Hearings on H. R. 5200 before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. (Mar. 13, 1972) (unpublished); Hearings on H. R. 5200, H. R. 14267 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. (May 8, 1972) (unpublished); Hearings on H. R. 14267, H. R. 5200 before the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess. (May 10, 1972) (unpublished); Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 before the Subcommittee on Indian Affairs of the Senate Committee of Interior and Insular Affairs, 92d Cong., 2d Sess., 60 *et seq.* (July 21, 1972) (unpublished).

were still unresolved, and distribution under the 1968 statute was virtually paralyzed. Hearings on H. R. 5200 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 92d Cong., 2d Sess., 12, 22, 59, 79, 97, 105–106, 113 (Mar. 13, 1972) (unpublished).

We recognize, as did the District Court, that Congress omitted the catchall provision from the present statute in order to avoid a repetition of the problems with the Munsees, and that Congress was not "made aware that the limitation of distribution to [the Cherokee and Absentee Delawares] would exclude a group which had lived on the Kansas Delaware lands and which could trace their Delaware descendancy as the Kansas Delawares do." 406 F. Supp., at 1332.[21] But we do not conclude from Congress' ignorance of the effect of the elimination of the catchall on the Kansas Delawares that the statute is therefore irrational. Congress chose to limit distribution of the award to the Cherokee and the Absentee Delawares, in whose names the Delawares' claims had been prosecuted before the Indian Claims Commission, and whom the Commission had found to represent the interests of all the Delawares. Regardless of Congress' knowledge of the effect of this limitation on the Kansas Delawares, we cannot say that the congressional choice, though predicated upon the Munsee experience under the 1968 statute, does not rationally support its decision to avoid undue delay, administrative difficulty, and potentially unmeritorious claims by distributing the award only to the Cherokee and Absentee Delawares.[22]

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[21] It seems apparent from the Senate and House Reports accompanying the bill that was eventually enacted that Congress was not made aware of the Kansas Delawares' existence, for the Reports state that the beneficiaries of the distribution will be the "[l]iving descendants of members of the Delaware Tribe as it existed in 1854." S. Rep. No. 92–1126, p. 6 (1972); H. R. Rep. No. 92–1081, p. 6 (1972).

[22] The congressional decision to distribute funds only to individuals who were members of, or clearly identified with, specific tribes has

IV

Our conclusion that the exclusion of the Kansas Delawares from distribution under Pub. L. 92–456 does not offend the Due Process Clause of the Fifth Amendment of course does not preclude Congress from revising the distribution scheme to include the Kansas Delawares. The distribution authorized by Pub. L. 92–456 has not yet occurred, and Congress has the power to revise its original allocation. *United States* v. *Jim*, 409 U. S., at 82–83.

Reversed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the result.

I join Parts I and II of the Court's opinion, but otherwise I concur only in the result.

For me, the reversal of the District Court's judgment is not a result that is so inevitable and so easily and smoothly reached as a reading of Part III of the Court's opinion makes it appear. The Court's justifications for exclusion of the Kansas Delawares are not very persuasive. The first—favoritism toward tribal Indians—is undermined by the fact that Absentee Delawares who are not members of that tribe nevertheless are entitled to participate. *Ante*, at 82 n. 14. The second—exclusion from a prior distribution—is troublesome because it is difficult for me to see how perceived prior unfair treatment buttresses further unfairness. And I wonder about the statement, *ante*, at 87, that Congress "has his-

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precedent in other similar statutes. See, *e. g.*, 25 U. S. C. §§ 565–565g (Klamath); 25 U. S. C. §§ 581–590c (1970 ed., Supp. V) (Shoshone and Shoshone-Bannock); 25 U. S. C. §§ 1071–1073 (1970 ed. and Supp. V) (Confederated Colville); 25 U. S. C. §§ 1161–1167 (1970 ed. and Supp. V) (Cheyenne-Arapaho); 25 U. S. C. §§ 1191–1195 (Confederated Umatilla); 25 U. S. C. §§ 1261–1265 (1970 ed., Supp. V) (Blackfeet and Gros Ventre); 25 U. S. C. §§ 1300b–1300b–5 (1970 ed., Supp. V) (Kickapoo); 25 U. S. C. §§ 1300c–1300c–5 (1970 ed., Supp. V) (Yankton Sioux); 25 U. S. C. §§ 1300e–1300e–7 (1970 ed., Supp. V) (Assiniboine).

torically distinguished" the Kansas Delawares from the Cherokee Delawares in distributing tribal awards, when in fact *both* participated in the 1968 allocation that Congress authorized for the Delawares. The third justification—administrative convenience in eliminating the catchall clause—may have some weight. But, as the opinion acknowledges, *ante*, at 88–89, there was no problem with the Kansas Delawares in the distribution of the 1968 award; the administrative difficulty was only with the Munsees.

Nevertheless, having said all this, I am not persuaded that the Court errs in its conclusion. For me, the case is one of that rare type in which the argument on each side is not at all strong. With the litigation in this lukewarm posture, I conclude that we must acknowledge that there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong. One could regard the distribution as a windfall for whichever beneficiaries are now favored. In light of the difficulty in determining appropriate standards for the selection of those who are to receive the benefits, I cannot say that the distribution directed by the Congress is unreasonable and constitutionally impermissible. Congress must have a large measure of flexibility in allocating Indian awards, and what it has done here is not beyond the constitutional pale.

MR. JUSTICE STEVENS, dissenting.

At the outset of these proceedings the Indian Claims Commission noted that in accordance with the Indian Claims Commission Act any recovery for a breach of the treaties of 1829 and 1854 "must be for the benefit of all the descendants of the Delaware Nation as constituted in 1829 and 1854," *Delaware Tribe of Indians* v. *United States*, 2 Ind. Cl. Comm. 253, 270–271 (1952).[1] In due course the Commission found

[1] Aff'd as to parties, 130 Ct. Cl. 782, 128 F. Supp. 391 (1955). The Commission relied on a contemporaneous holding of the Court of Claims to

that the 1854 treaty had been breached in 1856 and 1857 when the United States disposed of the tribal lands in Kansas by private, not public, sale for about half their fair value. The opinion accompanying the judgment of the Commission reiterated that the named plaintiffs "were entitled jointly to represent the entire Delaware Tribe," *Absentee Delaware Tribe of Oklahoma* v. *United States*, 21 Ind. Cl. Comm. 344, 345 (1969). Thereafter, Congress appropriated the amount required by the judgment, 83 Stat. 447, 453, and adopted the distribution statute at issue here, which was intended to satisfy that judgment, 25 U. S. C. §§ 1291–1297 (1970 ed., Supp. V).

Appellees, the "Kansas Delawares," are members of the class represented by the plaintiffs in the Indian Claims Commission proceeding.[2] There is no question about the fact that they are actual lineal descendants of members of the Delaware Tribe of 1854. Nor is there any question about the fact that their exclusion from the distribution statute is the consequence of a malfunction of the legislative process rather than a deliberate choice by Congress. At the urging of appellants Congress adopted an amendment to the bill in order to be sure that descendants of the Munsees—who had not been members of the Delaware Tribe since prior to 1818—would not participate in the award. Unfortunately, the amendment had the unintended consequence of also excluding the Kansas Delawares, whose ancestors were members of

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the same effect, *McGhee* v. *Creek Nation*, 122 Ct. Cl. 380, 388, 392, 396 (1952), cert. denied, 344 U. S. 856. That court, charged by statute with interpreting the Indian Claims Commission Act and reviewing the actions of the Commission, 25 U. S. C. § 70s, continues to adhere to this view: "[T]he ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity." *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 458, 490 F. 2d 935, 954 (1974).

[2] Indeed, a Kansas Delaware was chairman of the plaintiffs' business committee when the suit was filed in the Indian Claims Commission in 1951. Brief for Appellees 22.

the tribe in 1854 and who suffered precisely the same wrong as those whose descendants will share in the award on a per capita basis.[3]

These facts are undisputed. They make it perfectly clear that the special treatment of the Kansas Delawares does not in fact represent any rational attempt at "fulfillment of Congress' unique obligation toward the Indians . . . ." *Morton* v. *Mancari*, 417 U. S. 535, 555. I think it is equally clear that each of the three hypothetical justifications for the exclusion

[3] The words "Kansas Delaware" do not appear in the legislative history of 25 U. S. C. §§ 1291–1297 (1970 ed., Supp. V). The court below noted: "There is evidence in our record that at least some of the Cherokee and Absentee Delawares, themselves, were unaware of the existence of the Kansas Delawares at the time they testified before Congress. Mr. Townsend, the chairman of the Delaware Tribal Business Committee (Cherokee Delaware) and one of the principal witnesses before Congress urging the adoption of a distribution scheme utilizing only the 1906 and 1940 rolls, testified in the course of this litigation that he was unaware of the existence of the Kansas Delawares . . . ." *Weeks* v. *United States*, 406 F. Supp. 1309, 1331 n. 29 (WD Okla. 1975).

The District Court conducted an extensive review of the legislative history, *id.*, at 1330–1332, 1347–1351, and concluded:

"[T]he Congress was specifically requested by the Absentee Delawares and the Cherokee Delawares to delete the catchall provision [under which respondents would have claimed], and that Congress made the decision in response to the urging of those groups. On the record before us, we find that neither Congress nor its committees were made aware that the limitation . . . would exclude a group which had lived on the Kansas Delaware lands and which could trace their Delaware descendancy as the Kansas Delawares do. Instead the focus was on the Munsee Indian groups, including the Christian Indians, and paramount consideration was given to the Munsee situation in considering the proposed change in the distribution statute.

". . . It is disturbing that the Congress was apparently not aware of the Kansas Delaware group and we are persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution." *Id.*, at 1332.

In view of these undisputed findings it is also disturbing that the majority refers to a congressional "decision" to exclude the Kansas Delawares, *ante*, at 86.

of the Kansas Delawares advanced by the majority merely emphasizes the lack of any rational explanation for the legislative malfunction because each of the justifications would, if valid, require a different classification.

First, it is suggested that the Kansas Delawares were properly excluded because they terminated their membership in the tribe before the claim was reduced to judgment. But so did the Cherokees. They ceased being members of the Delaware Tribe in 1867, when they joined the Cherokee Nation.[4] Moreover, some of those who would share in the distribution on behalf of the Absentee Delawares are not members of that tribe.[5] Resignation from the tribe after the time of the wrong does not provide a consistent basis for treating the Kansas Delawares differently from the Cherokees or the Absentees.[6]

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[4] Articles of Agreement between the Cherokee Nation and the Delaware Tribe, Apr. 8, 1867, quoted in the Statement of the Case in *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 199–202. The agreement states, in part:

"'On the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided.

"'And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.'" *Id.*, at 202.

Aspects of the status of the Cherokee Delawares were adjudicated in *Journeycake* and in *Delaware Indians* v. *Cherokee Nation*, 193 U. S. 127. To be sure the Cherokee Delawares have recently reconstituted themselves as a recognized Indian tribe. This did not occur, however, until 1974, two years after Congress acted on the legislation in question.

[5] A person must have at least one-eighth Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. No such limitation exists as to the Absentee section of the distribution statute, 25 U. S. C. § 1292 (c)(2) (1970 ed., Supp. V). *Weeks* v. *United States*, 406 F. Supp. 1309, 1339 n. 40.

[6] It would be manifestly unjust to read the treaty of 1866, which led

Second, it is pointed out that the Kansas Delawares did not participate in the $150,000 distribution appropriated by Congress in 1904 to settle a claim arising out of another breach of the 1854 treaty. But neither did the Absentee Delawares. The reason is perfectly clear. The claim involved in that settlement had been asserted pursuant to a special provision in a Cherokee allotment statute designed to resolve all claims which "the Cherokee tribe, or any band thereof, . . . may have against the United States . . . ." 32 Stat. 726. Obviously, only the Cherokee Delawares could qualify as a band of the Cherokee Tribe. That precedent does not provide any basis for treating the Kansas Delawares differently from the Absentee Delawares, or for differentiating among Delawares in a proceeding brought on behalf of all descendants of the Delaware Nation as constituted in 1829 and 1854.[7]

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to the resignation of the Kansas Delawares, as providing an affirmative justification for depriving their descendants of their rightful share of the recovery based on the proceeds that should have been obtained from the sale of the tribal lands in 1856 and 1857. The 1866 treaty expressly provided that upon becoming a citizen of the United States each member was "entitled to receive a patent in fee-simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States . . . ." 14 Stat. 796.

The 1866 treaty was plainly intended to give the Kansas Delawares their proportionate interest in the proceeds of the sales made pursuant to the 1854 treaty. It is true that those proceeds were only about half as large as they would have been if the United States had fulfilled its treaty obligation, and I recognize that the unknown claim for the balance of the fair value of the tribal land was not technically "then held in trust by the United States." But surely it was the intention of the parties to the 1866 treaty to give the Kansas Delawares their fair share of the credits which should have been on the books as a result of the sale of tribal property as well as their share of the actual credits. See the discussion below, 406 F. Supp., at 1337 n. 39, and accompanying text.

[7] The more relevant precedent is the 1968 statute distributing the proceeds of the award based on the breach of the 1818 treaty, *ante*, at 88. All Delawares, including the Kansas Delawares, who traced their ancestry

Third, it is said that the amendment excluding the Kansas Delawares from the award is valid because (a) it was intended to exclude the Munsees, and (b) there were valid reasons for excluding the Munsees. The Munsees were the object of special legislative concern because the processing of their claims under a 1968 distribution statute had created administrative burdens and delay. They were properly excluded because their ancestors were not members of the tribe when the wrong occurred. Neither of these reasons has any relevance to the Kansas Delawares. They are admittedly lineal descendants of victims of the wrong and they had shared in the 1968 award in such an orderly manner that Congress was not even aware of their separate status. It is thus ironic—perhaps even perverse—to justify the special treatment of the Kansas Delawares by including them in a class whose other members were properly excluded from the award for reasons which have no application whatsoever to the Kansas Delawares. Because the Kansas Delawares were so administratively inoffensive that they literally became invisible they will fail to share in the distribution as a result of a decision to *avoid* administrative difficulty.

The statutory exclusion of the Kansas Delawares from any share in the fund appropriated to pay a judgment in favor of a class to which they belong is manifestly unjust and arbitrary. Neither the actual explanation, nor any of the hypothetical explanations, is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." But having said all this, I must confront the ultimate question whether the statute is therefore unconstitutional.

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to membership in the tribe in 1818, participated in that award. That award, like this one, but unlike the 1904 appropriation, was in satisfaction of an Indian Claims Commission judgment. Thus the more recent and more relevant congressional precedent supports inclusion of the Kansas Delawares, not exclusion.

Improbable as the possibility seems, I am not prepared to say that if Congress had actually reviewed the status of the Kansas Delawares, it might not have found some principled basis for treating them differently from other Delawares. And it is clear that the discrimination, far from evidencing actual discriminatory *intent*, is the consequence of a legislative *accident*, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should. I must also acknowledge that Congress followed accepted legislative procedures in enacting the statute. Finally, I am most reluctant to suggest that the constitutionality of legislation should turn on the actual motivation, or the lack thereof, of the legislators who participated in the legislative process. Perhaps, therefore, the Court is following a wise course in declining to intervene in an area where the greatest deference is due Congress.

Nevertheless, four considerations persuade me that this legislative classification is invalid. First, the members of the class whose rights were adjudicated by the Indian Claims Commission have more than an ordinary interest in equal treatment.[8] Second, there is no need for any discrimination at all within this class of litigants; this, therefore, is not a case in which the need to draw *some* line may justify the otherwise arbitrary character of the particular line which has been drawn.[9] Third, no principled justification for the particular

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[8] The fact that the legislative action under review is the culmination of a quasi-judicial proceeding brought on behalf of the entire class distinguishes this legislation from policy decisions of general applicability. Cf. *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 680 (1976) (STEVENS, J., dissenting). Moreover, " 'Congress' unique obligation toward the Indians,' " *ante*, at 85, surely includes a special responsibility to deal fairly with similarly situated Indians.

[9] Cf. *Mathews* v. *Diaz*, 426 U. S. 67, 82–84; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 41 (Holmes, J., dissenting).

discrimination against the Kansas Delawares has been identified. And fourth, there is no reason to believe that the discrimination is the product of an actual legislative choice.[10] Under these circumstances I conclude that there has been a deprivation of property without the "due process of lawmaking" that the Fifth Amendment guarantees.[11]

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[10] See *Mathews* v. *Lucas*, 427 U. S. 495, 516; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 n. 16; *Flemming* v. *Nestor*, 363 U. S. 603, 611; cf. *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 809; *Baker* v. *Carr*, 369 U. S. 186, 226; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415–416.

[11] Although I am indebted to Professor Linde for the phrase, I cannot fairly claim that my conclusion is compelled by the analysis in his illuminating article, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976).

Syllabus

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* SANDERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1443. Argued January 11-12, 1977—Decided February 23, 1977

1. Section 10 of the Administrative Procedure Act (APA), providing generally for judicial review of actions of federal administrative agencies by persons aggrieved by such actions, does not afford an implied grant to district courts of subject-matter jurisdiction to review a decision of the Secretary of Health, Education, and Welfare not to reopen a previously adjudicated claim for social security benefits. An interpretation in favor of jurisdiction is suggested by neither the text nor history of the APA, and would effectively override Congress' recent decision to expand jurisdiction under 28 U. S. C. § 1331 (a) by eliminating the amount-in-controversy requirement as a prerequisite to maintaining federal-question actions against federal agencies or officers or employees thereof, while retaining § 205 (h) of the Social Security Act as a limitation of such jurisdiction. Pp. 104–107.
2. Nor does § 205 (g) of the Social Security Act, which provides that any individual, after any "final decision of the Secretary made after a hearing" to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by civil action commenced within 60 days, authorize judicial review of the Secretary's decision, absent a constitutional challenge. A petition to reopen a prior final decision may be denied without a § 205 (b) hearing, whereas judicial review under § 205 (g) is limited to a final decision "made after a hearing"; moreover, to allow judicial review would frustrate the congressional purpose, evidenced in § 205 (g), to impose a 60-day limitation upon review of the Secretary's final decision. Pp. 107–109.

522 F. 2d 1167, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 109. STEVENS, J., took no part in the consideration or decision of the case.

Maurice Rosenberg argued the cause for petitioner. With

him on the briefs were *Solicitor General Bork, Assistant Attorney General Lee, Deputy Solicitor General Jones,* and *Robert E. Kopp.*

William A. Kowalski argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The questions for decision are (1) whether § 10 of the Administrative Procedure Act, 5 U. S. C. §§ 701–706,[1] is an

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**Dennis M. Sweeney* filed a brief for the Administrative Law Center, Legal Aid Bureau, Inc., as *amicus curiae* urging reversal.

[1] The pertinent provisions of § 10, as codified in 5 U. S. C. §§ 701–704, are the following:

"§ 701. Application; definitions.

"(a) This chapter applies, according to the provisions thereof, except to the extent that—

"(1) statutes preclude judicial review; or

"(2) agency action is committed to agency discretion by law."

"§ 702. Right of review.

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

"§ 703. Form and venue of proceeding.

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." (Sections 702 and 703 were amended by Pub. L. 94–574, 90 Stat. 2721, in respects to be discussed *infra,* at 105–107, insofar as it modifies the scope of jurisdiction under 28 U. S. C. § 1331.)

"§ 704. Actions reviewable.

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling

independent grant to district courts of subject-matter jurisdiction to review a decision of the Secretary of Health, Education, and Welfare not to reopen a previously adjudicated claim for social security benefits and (2), if not, whether § 205 (g) of the Social Security Act [2] authorizes judicial review of the Secretary's decision.

I

Title II of the Social Security Act provides disability benefits for a claimant who demonstrates that he suffers a physical or mental disability within the meaning of the Act and that the disability arose prior to the expiration of his insured status. 42 U. S. C. §§ 416 (i), 423. The administrative process is begun when he files a claim with the Social Security Administration. 20 CFR §§ 404.905–404.907 (1976). If the claim is administratively denied, regulations permit administrative reconsideration within a six-month period. §§ 404.909–404.915. Should a request for reconsideration prove unsuccessful, the claimant may, within 60 days, ask for an evidentiary hearing before an administrative law judge, 42 U. S. C. § 405 (b) (1970 ed., Supp. V), and a discretionary appeal from an adverse determination of the law judge lies to the Appeals Council. 20 CFR §§ 404.945–404.947

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not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

[2] Section 205 (g) of the Social Security Act, 49 Stat. 620, as added and amended, 42 U. S. C. § 405 (g), provides in pertinent part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . ."

(1976). Finally § 205 (g) of the Act, 42 U. S. C. § 405 (g), authorizes federal judicial review of "any final decision of the Secretary made after a hearing to which [the claimant] was a party . . . ."

The Act and regulations thus create an orderly administrative mechanism, with district court review of the final decision of the Secretary, to assist in the original processing of the more than 7,600,000 claims filed annually with the Administration. See Social Security Administration, The Year in Review—The Administration of Social Security Programs 1975, p. 54 (1976). By regulation, however, the administrative scheme provides for additional consideration of the claim. This is in the form of regulations for reopening of the agency determination within specified time limits after the date of initial determination: 12 months as a matter of right and four years "upon a finding of good cause," which exists if new material evidence is provided or specific errors are discovered. 20 CFR §§ 404.957 (a), (b), 404.958 (1976). Moreover, the regulations permit reopening "[a]t any time" for the purpose of correcting clerical errors or errors on the face of relevant evidence. § 404.957 (c)(8).

On January 30, 1964, respondent filed his initial claim with the agency for disability payments and disability insurance benefits, alleging inability to work because of epilepsy and blackout spells. The claim proceeded through the several steps of the administrative procedures. An Administrative Law Judge found that respondent was ineligible for benefits on the ground that he had not demonstrated a relevant disability of sufficient severity. The Appeals Council, in June 1966, sustained this decision, and respondent did not pursue judicial review of the Secretary's final decision under § 205 (g).

Almost seven years later, on March 5, 1973, respondent filed a second claim alleging the same bases for eligibility. His claim was again processed through administrative channels under the Secretary's regulations. The Administrative Law

Judge viewed the new application as barred by res judicata, see 20 CFR § 404.937 (1976), but also treated the application as requiring the determination "whether the claimant is entitled to have his prior application reopened . . . ." App. 33–34. Concluding that respondent's evidence was "merely rep[e]titio[u]s and cumulative," *id.*, at 35, and finding no errors on the face of the evidence, *ibid.*, the Administrative Law Judge denied reopening and dismissed the claim.

Respondent thereupon filed this action in the District Court for the Northern District of Indiana, challenging the Secretary's decision not to reopen, and resting jurisdiction on § 205 (g), 42 U. S. C. § 405 (g). The District Court dismissed the complaint on the ground stated in its unpublished memorandum that "this court is without jurisdiction to consider the subject matter of this suit." Pet. for Cert. 13a–14a. The Court of Appeals for the Seventh Circuit reversed. *Sanders* v. *Weinberger*, 522 F. 2d 1167 (1975). The Court of Appeals agreed that jurisdiction to review a refusal to reopen a claim proceeding on the ground of abuse of discretion was not authorized by the Social Security Act. *Id.*, at 1169. The court held, however, that § 205 (h) [3] did not limit judicial review to those methods "expressly authorize[d]" by the Social Security Act itself. Therefore, the Court of Appeals con-

[3] Section 205 (h) of the Social Security Act, 42 U. S. C. § 405 (h), provides:

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under this subchapter."

This section has been held to require the exhaustion of available administrative procedures, to foreclose jurisdiction under the general grant of federal-question jurisdiction, 28 U. S. C. § 1331, and to route review through § 205 (g). See *Weinberger* v. *Salfi*, 422 U. S. 749, 757, 761 (1975).

cluded that § 10 of the Administrative Procedure Act (APA), which "contains an independent grant of subject-matter jurisdiction, without regard to the amount in controversy," afforded the District Court jurisdiction of respondent's complaint. 522 F. 2d, at 1169. We granted certiorari *sub nom. Mathews* v. *Sanders*, 426 U. S. 905 (1976). We reverse.

II

A

The Court of Appeals acknowledged that its construction of § 10 of the APA as an independent grant of subject-matter jurisdiction is contrary to the conclusion reached by several other Courts of Appeals. 522 F. 2d, at 1169. This conflict is understandable. None of the codified statutory sections that constitute § 10 is phrased like the usual grant of jurisdiction to proceed in the federal courts. On the other hand, the statute undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials. Consequently, courts[4] and commentators[5] have sharply divided

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[4] The Courts of Appeals for the First, Fourth, Fifth, Seventh, Ninth, Tenth, and District of Columbia Circuits have held that § 10 of the APA is an independent grant of jurisdiction. See *Bradley* v. *Weinberger*, 483 F. 2d 410 (CA1 1973); *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (CA4 1961); *Ortego* v. *Weinberger*, 516 F. 2d 1005 (CA5 1975); *Sanders* v. *Weinberger*, 522 F. 2d 1167 (CA7 1975) (case below); *Brandt* v. *Hickel*, 427 F. 2d 53 (CA9 1970); *Brennan* v. *Udall*, 379 F. 2d 803 (CA10 1967); *Pickus* v. *United States Board of Parole*, 165 U. S. App. D. C. 284, 507 F. 2d 1107 (1974). The Courts of Appeals for the Third, Sixth, and Eighth Circuits disagree. *Zimmerman* v. *United States*, 422 F. 2d 326 (CA3 1970); *Bramblett* v. *Desobry*, 490 F. 2d 405 (CA6 1974); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (CA8 1967). The Court of Appeals for the Second Circuit views the question as unsettled. See *South Windsor Convalescent Home, Inc.* v. *Mathews*, 541 F. 2d 910 (1976).

[5] Compare, *e. g.*, Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Admin-

over whether the statute should be read to provide a distinct basis of jurisdiction for the review of agency actions. Three decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject-matter jurisdiction. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967); *Rusk* v. *Cort*, 369 U. S. 367, 372 (1962). However, an Act of Congress enacted since our grant of certiorari in this case now persuades us that the better view is that the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions.

On October 21, 1976, Congress enacted Pub. L. 94–574, 90 Stat. 2721, which amends 28 U. S. C. § 1331 (a) to eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of "any [§ 1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. We conclude that this amendment now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.

As noted previously, the actual text of § 10 of the APA nowhere contains an explicit grant of jurisdiction to challenge

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istrative Action, 81 Harv. L. Rev. 308 (1967), K. Davis, Administrative Law Treatise § 23.02 (Supp. 1976), and L. Jaffe, Judicial Control of Administrative Action 165 (1965) (all advocating APA jurisdiction), with Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 389 (1970), and C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3568 (1975) (rejecting APA jurisdiction).

agency action in the federal courts.[6] Furthermore, even the advocates of jurisdiction under the APA acknowledge that there is no basis for concluding that Congress, in enacting § 10 of the APA, actually conceived of the Act in jurisdictional terms. See, *e. g.*, Byse & Fiocca, *supra*, n. 5, at 328. Thus, the argument in favor of APA jurisdiction rests exclusively on the broad policy consideration that, given the shortcomings of federal mandamus jurisdiction, such a construction is warranted by the rational policy of affording federal judicial review of actions by federal officials acting pursuant to federal law, notwithstanding the absence of the requisite jurisdictional amount. See *id.*, at 330–331; Jaffe, *supra*, n. 5, at 165. We do not find this argument to be compelling in light of Congress' apparent intention by the 1976 amendment to restructure afresh the scope of federal-question jurisdiction.

In amending § 1331, Congress obviously has expressly acted to fill the jurisdictional void created by the pre-existing amount-in-controversy requirement. This new jurisdictional grant was qualified, however, by the retention of § 205 (h) as preclusive of actions such as this that arise under the Social Security Act. Read together, the expansion of § 1331, coupled with the retention of § 205 (h), apparently expresses Congress' view of the desired contours of federal-question jurisdiction over agency action. A broad reading of the APA in this instance would serve no purpose other than to modify Congress' new jurisdictional enactment by overriding its decision to limit § 1331 through the preservation of § 205 (h). Squarely faced with the question of APA jurisdiction for the

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[6] Title 5 U. S. C. § 702 makes clear that a person wronged by agency action "is entitled to judicial review thereof." But § 703 suggests that this language was not intended as an independent jurisdictional foundation, since such judicial review is to proceed "in a court specified by statute" or "in a court of competent jurisdiction." Both of these clauses seem to look to outside sources of jurisdictional authority. Thus, at best, the text of § 10 is ambiguous in providing a separate grant of subject-matter jurisdiction.

first time, Congress' explicit entry into the jurisdictional area counsels against our reading the APA as an implied jurisdictional grant designed solely to fill such an interstitial gap in § 1331 jurisdiction. This is particularly so since neither the text nor the history of the APA speaks in favor of such a reading, and the 1976 Congress, in redefining § 1331, appears not to have envisioned the APA as playing any such stopgap role.[7]

We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.

B

Respondent contends that notwithstanding the above, the Social Security Act itself, specifically § 205 (g), should be construed to authorize judicial review of a final decision of the Secretary not to reopen a claim of benefits. All Courts of Appeals that have considered this contention have rejected it.[8] We also agree that § 205 (g) cannot be read to authorize

[7] Respondent argues that Congress intended its modification of § 1331 to be supplementary to the APA, and, therefore, contemplated that the APA would remain as a distinct jurisdictional provision. But the contrary seems true, for the legislative history suggests that Congress believed that the APA does not confer jurisdiction over administrative action, and, therefore, deletion of the jurisdictional amount from § 1331 was warranted. This understanding was made explicit by the Senate Judiciary Committee: "An anomaly in Federal jurisdiction *prevents* an otherwise competent United States district court from hearing certain cases seeking *'non-statutory' review of Federal administrative action,* absent the jurisdictional amount in controversy required by 28 U. S. C. section 1331, the general 'Federal question' provision. These cases 'arise under' the Federal Constitution or Federal statutes, and the committee believes they are appropriate matters for the exercise of Federal judicial power regardless of the monetary amount involved." S. Rep. No. 94–996, p. 12 (1976) (emphasis supplied); see H. R. Rep. No. 94–1656, p. 13 (1976).

[8] See *Cappadora* v. *Celebrezze,* 356 F. 2d 1, 4–5 (CA2 1966); *Davis* v. *Richardson,* 460 F. 2d 772, 775 (CA3 1972); *Ortego* v. *Weinberger,* 516 F. 2d, at 1007–1008; *Maddox* v. *Richardson,* 464 F. 2d 617, 621 (CA6 1972); *Stuckey* v. *Weinberger,* 488 F. 2d 904, 909 (CA9 1973); *Neighbors*

judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits.

The pertinent part of § 205 (g) provides:

> "Any individual, after any *final decision of the Secretary made after a hearing* to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days . . . ." (Emphasis supplied.)

This provision clearly limits judicial review to a particular type of agency action, a "final decision of the Secretary made after a hearing." But a petition to reopen a prior final decision may be denied without a hearing as provided in § 205 (b), 42 U. S. C. § 405 (b) (1970 ed., Supp. V); see *Cappadora* v. *Celebrezze*, 356 F. 2d 1, 4 (CA2 1966); *Ortego* v. *Weinberger*, 516 F. 2d 1005, 1007 (CA5 1975). Indeed, the opportunity to reopen final decisions and any hearing convened to determine the propriety of such action are afforded by the Secretary's regulations and not by the Social Security Act. Moreover, an interpretation that would allow a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in § 205 (g), to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits. 20 CFR § 404.951 (1976). Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice.

Respondent argues, however, that *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), have rejected this interpretation of § 205 (g). We do not agree. It is true that both cases authorized judicial

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v. *Secretary of Health, Education, and Welfare*, 511 F. 2d 80, 81 (CA10 1974).

review under § 205 (g) of the Secretary's decision to deny or discontinue social security benefits notwithstanding the absence of a prior § 205 (b) hearing. In both instances, however, the claimants challenged the Secretary's decisions on constitutional grounds. Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. Furthermore, since federal-question jurisdiction under 28 U. S. C. § 1331 is precluded by § 205 (h), *Weinberger* v. *Salfi*, *supra*, at 761, a decision denying § 205 (g) jurisdiction in *Salfi* or *Eldridge* would effectively have closed the federal forum to the adjudication of colorable constitutional claims. Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by " 'clear and convincing' " evidence. 422 U. S., at 762; *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974).

This is not one of those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds. Respondent seeks only an additional opportunity to establish that he satisfies the Social Security Act's eligibility standards for disability benefits. Therefore, § 205 (g) does not afford subject-matter jurisdiction in this case.

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I agree with the Court that Sanders cannot seek judicial review of the Secretary's refusal to reopen a final decision

denying social security benefits. I arrive at that conclusion, however, by a somewhat shorter route.

Section 205 (h) of the Social Security Act, 42 U. S. C. § 405 (h), states in full:

> "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under this subchapter."

It is clear that the determination not to reopen the prior decision denying benefits to Sanders was a "findin[g] of fact or decision of the Secretary." The conclusion is thus inescapable, as I see it, that the administrative decision before us is not to "be reviewed by any person, tribunal, or governmental agency except as herein provided"—that is, except as the Social Security Act itself, specifically in § 205 (g), 42 U. S. C. § 405 (g), authorizes review. Although the apparent literal meaning of statutory language is not an unfailing guide to the meaning of a congressional enactment, I can see no reason in this case why the second sentence of § 205 (h) should not be read to mean exactly what it says—that the decision before us is reviewable under § 205 (g) or not at all.

The Court's decision in *Weinberger* v. *Salfi*, 422 U. S. 749, supports this reading of § 205 (h). *Salfi* held that the first two sentences of § 205 (h) "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § [2]05 (g)." 422 U. S., at 757. Although *Salfi* was principally concerned with an assertion of jurisdiction under 28 U. S. C. § 1331, the plaintiffs there, like Sanders, also relied upon § 10 of the Administrative Procedure Act, 5 U. S. C. §§ 701–706. See Brief for Appellants 17 n. 13, Brief for Ap-

pellees 42, and App. 7, in *Weinberger* v. *Salfi*, O. T. 1974, No. 74–214. Yet the Court ruled that, as to those plaintiffs who could not seek review under § 205 (g), the District Court should have dismissed the complaint because "[o]ther sources of jurisdiction [were] foreclosed by § [2]05 (h)." 422 U. S., at 764.*

Thus, I see no reason at all in this case to consider whether § 10 of the APA in general confers subject-matter jurisdiction upon the district courts to review federal administrative action. For even if it does, § 205 (h) specifically and unequivocally limits Sanders and others in his position to whatever jurisdiction is provided under § 205 (g). And as the Court today explains, *ante*, at 107–109, there is clearly no jurisdiction under the latter provision to review the Secretary's refusal to reopen the decision denying benefits to Sanders.

Accordingly, I concur in the judgment.

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*The *Salfi* Court's treatment of the first two sentences of § 205 (h) as requiring the exhaustion of administrative remedies, 422 U. S., at 757, is in no way inconsistent with a reading of the second sentence of § 205 (h) as precluding review outside of § 205 (g). That sentence simply requires that all review take place within the confines of the procedural scheme established by § 205 (g). Section 205 (h) thus bars attempts to circumvent those procedures, whether by seeking review under § 205 (g) without having fulfilled the exhaustion requirement, or by seeking review under some other jurisdictional grant that does not prescribe the administrative steps that must first be taken.

E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-978. Argued December 8, 1976—Decided February 23, 1977*

The Federal Water Pollution Control Act Amendments of 1972 (Amendments) authorized a series of steps to be taken to eliminate all discharges of pollutants into the Nation's waters by 1985. The first steps are described in § 304 of the Act (as added by the Amendments), which directs the Administrator of the Environmental Protection Agency (EPA) (the agency charged under § 101 with administering the Amendments) to develop and publish various kinds of technical data as guidelines for carrying out responsibilities under the Amendments. Section 301 (a) proscribes the discharge of any pollutant unless the discharge complies with certain sections, including § 301 itself, § 306, and § 402. Section 301 (b) defines the effluent limitations that must be achieved for existing "point sources" (conveyances from which pollutants are discharged) in two stages: (1) No later than July 1, 1977, such limitations for point sources must require the application of the "best practicable control technology currently available," and (2) by July 1, 1983, the limitations for "categories and classes of point sources" must require application of the "best available technology economically achievable." Section 301 (c) authorizes the EPA Administrator to grant variances for the 1983 limitations for any point source for which a permit application is filed after July 1, 1977. Section 306 (b) directs the Administrator to publish regulations establishing national standards for new sources within each category of sources discharging pollutants, and § 306 (e) makes it unlawful to operate a new source in violation of the applicable standard. Section 402 authorizes the Administrator to issue permits for individual point sources, and also to review and approve the plan of any State desiring to administer its own permit program. Section 509 (b)(1)(E) provides that review of the Administrator's action in approving or promulgating any effluent limitation under § 301 or

*Together with No. 75-1473, *E. I. du Pont de Nemours & Co. et al.* v. *Train, Administrator, Environmental Protection Agency*, and No. 75-1705, *Train, Administrator, Environmental Protection Agency* v. *E. I. du Pont de Nemours & Co. et al.*, also on certiorari to the same court.

§ 306 may be had in the courts of appeals. The EPA, which is empowered under § 501 (a) to make "such regulations as are necessary to carry out" its functions, promulgated industrywide regulations imposing three sets of limitations on petitioner inorganic chemical manufacturers' discharges of pollutants into waters. The first two impose progressively higher levels of pollutant control on existing point sources (a) after July 1, 1977, and (b) after July 1, 1983, and the third set imposes limits on "new sources" that may be constructed in the future. Petitioner manufacturers filed both a suit in the District Court to set aside the regulations and a petition for review of the regulations in the Court of Appeals, contending that § 301 is not an independent source of authority for setting effluent limitations by regulation but is merely a description of such limitations which are set for each plant on an individual basis during the permit-issuance process, and that § 402 provides the only authority for issuance of enforceable limitations on the discharge of pollutants by existing plants. The Court of Appeals affirmed the District Court's dismissal of the suit to set aside the regulations on the ground that the Court of Appeals had exclusive jurisdiction to consider the validity of the regulations, and held on the petition for review that the EPA was authorized to issue "presumptively applicable" effluent limitations and new source standards, and was required to provide a variance procedure for new sources. *Held:*

1. The EPA has authority under § 301 to limit discharges by existing plants through industrywide regulations setting forth uniform effluent limitations for both 1977 and 1983, provided some allowance is made for variations in individual plants. Pp. 126–136.

(a) Both the language of § 301 and the legislative history of the Amendments support the view that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations. Pp. 126–130.

(b) The legislative history also makes it clear that § 304 guidelines are not merely aimed at guiding the discretion of permit issuers in setting limitations for individual plants, but § 304 requires that the guidelines survey the practicable or available pollution control technology for an industry and assess its effectiveness, and then describe the methodology the EPA intends to use in the § 301 regulations to determine the effluent limitations for particular plants. Pp. 130–132.

(c) The above construction of the Amendments is also supported by §§ 101 (d) and 501 (a). Pp. 132–133.

2. Section 509 (b) (1) (E) unambiguously authorizes court of appeals review of EPA action promulgating an effluent limitation for existing

point sources under § 301, and the reference in § 509 (b) (1) (E) to § 301 was not intended only to provide for review of the grant or denial of an individual variance under § 301 (c). Since effluent limitations are typically promulgated in the same proceeding as the new-source standards under § 306, there is no doubt that Congress intended review of the two sets of regulations to be had in the same forum. Pp. 136–137.

3. Variances for individual plants unable to comply with the new-source standards issued under § 306 are not authorized. Congress clearly intended regulations under § 306 to be absolute prohibitions, as is indicated by the use of the word "standards" in § 306, as well as by the description of the preferred standard as one "permitting *no* discharge of pollutants." Pp. 137–139.

No. 75–978, 528 F. 2d 1136, affirmed; Nos. 75–1473 and 75–1705, 541 F. 2d 1018, affirmed in part and reversed in part.

STEVENS, J., delivered the opinion of the Court, in which all Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

Robert C. Barnard argued the cause for petitioners in Nos. 75–978 and 75–1473 and for respondents in No. 75–1705. With him on the briefs was *Charles F. Lettow.*

Deputy Solicitor General Friedman argued the cause for respondents in Nos. 75–978 and 75–1473 and for petitioner in No. 75–1705. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Taft, Howard E. Shapiro, Edmund B. Clark, Kathryn A. Oberly,* and *Alan W. Eckert.*†

MR. JUSTICE STEVENS delivered the opinion of the Court.

Inorganic chemical manufacturing plants operated by the eight petitioners in Nos. 75–978 and 75–1473 discharge various

†*Frederick M. Rowe, Edward W. Warren,* and *Stark Ritchie* filed a brief for the American Petroleum Institute as *amicus curiae* in Nos. 75–1473 and 75–1705 urging reversal.

George C. Freeman, Jr., and *Henry V. Nickel* filed a brief for the Appalachian Power Co. et al. as *amici curiae* in Nos. 75–1473 and 75–1705 urging affirmance.

Briefs of *amici curiae* in No. 75–978 were filed by *Thomas H. Truitt* for the American Paper Institute, and by *Edward L. Strohbehn, Jr.,* for the Natural Resources Defense Council, Inc.

pollutants into the Nation's waters and therefore are "point sources" within the meaning of the Federal Water Pollution Control Act (Act), as added and amended by § 2 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (1970 ed., Supp. V).[1] The Environmental Protection Agency [2] has promulgated industrywide regulations imposing three sets of precise limitations on petitioners' discharges. The first two impose progressively higher levels of pollution control on existing point sources after July 1, 1977, and after July 1, 1983, respectively. The third set imposes limits on "new sources" that may be constructed in the future.[3]

These cases present three important questions of statutory construction: (1) whether EPA has the authority under § 301 of the Act to issue industrywide regulations limiting discharges by existing plants; (2) whether the Court of Appeals, which admittedly is authorized to review the standards for new sources, also has jurisdiction under § 509 to review the regulations concerning existing plants; and (3) whether the new-source standards issued under § 306 must allow variances for individual plants.

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[1] A "point source" is "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged." § 502 (14), 33 U. S. C. § 1362 (14) (1970 ed., Supp. V).

[2] Throughout this opinion we will refer interchangeably to the Administrator of the EPA and to the Agency itself.

[3] The reasons for the statutory scheme have been described as follows:

"Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 204–205 (footnotes omitted).

As a preface to our discussion of these three questions, we summarize relevant portions of the statute and then describe the procedure which EPA followed in promulgating the challenged regulations.

The Statute

The statute, enacted on October 18, 1972, authorized a series of steps to be taken to achieve the goal of eliminating all discharges of pollutants into the Nation's waters by 1985, § 101 (a)(1).

The first steps required by the Act are described in § 304, which directs the Administrator to develop and publish various kinds of technical data to provide guidance in carrying out responsibilities imposed by other sections of the Act. Thus, within 60 days, 120 days, and 180 days after the date of enactment, the Administrator was to promulgate a series of guidelines to assist the States in developing and carrying out permit programs pursuant to § 402. §§ 304 (h), (f), (g). Within 270 days, he was to develop the information to be used in formulating standards for new plants pursuant to § 306. § 304 (c). And within one year he was to publish regulations providing guidance for effluent limitations on existing point sources. Section 304 (b)[4] goes into great detail concerning

[4] Section 304 (b) provides:

"(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

"(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than

the contents of these regulations. They must identify the degree of effluent reduction attainable through use of the best practicable or best available technology for a class of plants. The guidelines must also "specify factors to be taken into account" in determining the control measures applicable to point sources within these classes. A list of factors to be considered then follows. The Administrator

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publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

"(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

"(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants." 86 Stat. 851, 33 U. S. C. § 1314 (b) (1970 ed., Supp. V).

was also directed to develop and publish, within one year, elaborate criteria for water quality accurately reflecting the most current scientific knowledge, and also technical information on factors necessary to restore and maintain water quality. § 304 (a). The title of § 304 describes it as the "information and guidelines" portion of the statute.

Section 301 is captioned "effluent limitations." [5] Section

[5] Section 301 provides in pertinent part:

"SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

"(b) In order to carry out the objective of this Act there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304 (b) of this Act . . . .

. . . . .

"(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304 (b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304 (b)(2) of this Act . . . .

. . . . .

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or

301 (a) makes the discharge of any pollutant unlawful unless the discharge is in compliance with certain enumerated sections of the Act. The enumerated sections which are relevant to this case are § 301 itself, § 306, and § 402.[6] A brief word about each of these sections is necessary.

Section 402[7] authorizes the Administrator to issue permits for individual point sources, and also authorizes him to review and approve the plan of any State desiring to administer its own permit program. These permits serve "to transform generally applicable effluent limitations . . . into the obligations (including a timetable for compliance) of the individual discharger[s] . . . ." *EPA* v. *California ex rel. State*

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operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

"(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

"(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act." 86 Stat. 844, 33 U. S. C. § 1311 (1970 ed., Supp. V).

[6] There is no provision for compliance with § 304, the guideline section.

[7] Section 402 (a) (1) provides:

"Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 86 Stat. 880, 33 U. S. C. § 1342 (a) (1) (1970 ed., Supp. V).

Under § 402 (b), the Administrator may delegate this authority to the States, but retains the power to withdraw approval of the state program, § 402 (c) (3), and to veto individual state permits, § 402 (d). Finally, under § 402 (k), compliance with the permit is generally deemed compliance with § 301. Twenty-seven States now administer their own permit programs.

Water Resources Control Board, 426 U. S. 200, 205. Petitioner chemical companies' position in this litigation is that § 402 provides the only statutory authority for the issuance of enforceable limitations on the discharge of pollutants by existing plants. It is noteworthy, however, that although this section authorizes the imposition of limitations in individual permits, the section itself does not mandate either the Administrator or the States to use permits as the method of prescribing effluent limitations.

Section 306 [8] directs the Administrator to publish within 90 days a list of categories of sources discharging pollutants and,

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[8] The pertinent provisions of § 306, 86 Stat. 854, 33 U. S. C. § 1316 (1970 ed., Supp. V), are as follows:

"(a) For purposes of this section:

"(1) The term 'standard of performance' means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

. . . . . .

"(b)(1) . . .

"(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. . . .

"(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

"(3) The provisions of this section shall apply to any new source owned or operated by the United States.

. . . . . .

"(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source."

within one year thereafter, to publish regulations establishing national standards of performance for new sources within each category. Section 306 contains no provision for exceptions from the standards for individual plants; on the contrary, subsection (e) expressly makes it unlawful to operate a new source in violation of the applicable standard of performance after its effective date. The statute provides that the new-source standards shall reflect the greatest degree of effluent reduction achievable through application of the best available demonstrated control technology.

Section 301 (b) defines the effluent limitations that shall be achieved by existing point sources in two stages. By July 1, 1977, the effluent limitations shall require the application of the best *practicable* control technology currently available; by July 1, 1983, the limitations shall require application of the best *available* technology economically achievable. The statute expressly provides that the limitations which are to become effective in 1983 are applicable to "categories and classes of point sources"; this phrase is omitted from the description of the 1977 limitations. While § 301 states that these limitations "shall be achieved," it fails to state who will establish the limitations.

Section 301 (c) authorizes the Administrator to grant variances from the 1983 limitations. Section 301 (e) states that effluent limitations established pursuant to § 301 shall be applied to all point sources.

To summarize, § 301 (b) requires the achievement of effluent limitations requiring use of the "best practicable" or "best available" technology. It refers to § 304 for a definition of these terms. Section 304 requires the publication of "regulations, providing guidelines for effluent limitations." Finally, permits issued under § 402 must require compliance with § 301 effluent limitations. Nowhere are we told who sets the § 301 effluent limitations, or precisely how they relate to § 304 guidelines and § 402 permits.

The Regulations

The various deadlines imposed on the Administrator were too ambitious for him to meet. For that reason, the procedure which he followed in adopting the regulations applicable to the inorganic chemical industry and to other classes of point sources is somewhat different from that apparently contemplated by the statute. Specifically, as will appear, he did not adopt guidelines pursuant to § 304 before defining the effluent limitations for existing sources described in § 301 (b) or the national standards for new sources described in § 306. This case illustrates the approach the Administrator followed in implementing the Act.

EPA began by engaging a private contractor to prepare a Development Document. This document provided a detailed technical study of pollution control in the industry. The study first divided the industry into categories. For each category, present levels of pollution were measured and plants with exemplary pollution control were investigated. Based on this information, other technical data, and economic studies, a determination was made of the degree of pollution control which could be achieved by the various levels of technology mandated by the statute. The study was made available to the public and circulated to interested persons. It formed the basis of "effluent limitation guideline" regulations issued by EPA after receiving public comment on proposed regulations. These regulations divide the industry into 22 subcategories. Within each subcategory, precise numerical limits are set for various pollutants.[9] The regulations for

[9] Some subcategories are required to eliminate all discharges by 1977. *E. g.*, 40 CFR §§ 415.70–415.76 (1976). Other subcategories are subject to less stringent restrictions. For instance, by 1977 plants producing titanium dioxide by the chloride process must reduce average daily discharges of dissolved iron to 0.72 pounds per thousand pounds of product. This limit is cut in half for existing plants in 1983 and for all new plants. 40 CFR §§ 415.220–415.225 (1976).

each subcategory contain a variance clause, applicable only to the 1977 limitations.[10]

Eight chemical companies filed petitions in the United States Court of Appeals for the Fourth Circuit for review of these regulations.[11] The Court of Appeals rejected their challenge to EPA's authority to issue precise, single-number limitations for discharges of pollutants from existing sources. It held, however, that these limitations and the new plant standards were only "presumptively applicable" to individual plants.[12] We granted the chemical companies' petitions for certiorari in order to consider the scope of EPA's authority to issue existing-source regulations. 425 U. S. 933; 426 U. S. 947. We also granted the Government's cross-petition for review of the ruling that new-source standards are only pre-

[10] These limitations may be made "either more or less stringent" to the extent that "factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered" in establishing the limitations. See, *e. g.*, for the two subcategories discussed in n. 9, *supra*, 40 CFR §§ 415.72 and 415.222 (1976), respectively.

[11] Because EPA's authority to issue the regulations is closely tied to the question whether the regulations are directly reviewable in the Court of Appeals, see *infra*, at 124–125, some of the companies also filed suit in District Court challenging the regulations. The District Court held that EPA had the authority to issue the regulations and that exclusive jurisdiction was therefore in the Court of Appeals. 383 F. Supp. 1244 (WD Va. 1974), aff'd, 528 F. 2d 1136 (CA4 1975) (*Du Pont I*).

[12] The Court of Appeals issued two separate opinions. In *Du Pont I*, *supra*, the court held that it had exclusive jurisdiction to consider the validity of the regulations. It therefore affirmed the District Court's dismissal of a suit to set aside the regulations. See n. 11, *supra*. In *Du Pont II*, 541 F. 2d 1018 (1976), the court held that EPA was authorized to issue "presumptively applicable" effluent limitations and new-source standards. No. 75–978 is the companies' petition for certiorari in *Du Pont I*, which we granted last Term, 425 U. S. 933. No. 75–1473 is their petition in *Du Pont II*. We granted that petition, consolidated it with EPA's cross-petition, No. 75–1705, and ordered that they be argued in tandem with the companies' petition in *Du Pont I*. 426 U. S. 947.

sumptively applicable. *Ibid.* For convenience, we will refer to the chemical companies as the "petitioners."

The Issues

The broad outlines of the parties' respective theories may be stated briefly. EPA contends that § 301 (b) authorizes it to issue regulations establishing effluent limitations for classes of plants. The permits granted under § 402, in EPA's view, simply incorporate these across-the-board limitations, except for the limited variances allowed by the regulations themselves and by § 301 (c). The § 304 (b) guidelines, according to EPA, were intended to guide it in later establishing § 301 effluent-limitation regulations. Because the process proved more time consuming than Congress assumed when it established this two-stage process, EPA condensed the two stages into a single regulation.[13]

In contrast, petitioners contend that § 301 is not an independent source of authority for setting effluent limitations by regulation. Instead, § 301 is seen as merely a description of the effluent limitations which are set for each plant on an individual basis during the permit-issuance process. Under the industry view, the § 304 guidelines serve the function of guiding the permit issuer in setting the effluent limitations.

The jurisdictional issue is subsidiary to the critical question whether EPA has the power to issue effluent limitations by regulation. Section 509 (b)(1), 86 Stat. 892, 33 U. S. C. 1369 (b)(1), provides that "[r]eview of the Administrator's action . . . (E) in approving or promulgating any effluent limitation . . . under section 301" may be had in the courts of appeals. On the other hand, the Act does not provide for judicial review of § 304 guidelines. If

[13] Section 304 (b) calls for publication of guideline regulations within one year of the Act's passage. EPA failed to meet this deadline and was ordered to issue the regulations on a judicially imposed timetable. *Natural Resources Defense Council, Inc.* v. *Train*, 166 U. S. App. D. C. 312, 510 F. 2d 692 (1975).

EPA is correct that its regulations are "effluent limitation[s] under section 301," the regulations are directly reviewable in the Court of Appeals. If industry is correct that the regulations can only be considered § 304 guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere.[14] Thus, the issue of jurisdiction to review the regulations is intertwined with the issue of EPA's power to issue the regulations.[15]

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[14] Although the Act itself does not provide for review of guidelines, the Eighth Circuit has held that they are reviewable in the district court, apparently under the Administrative Procedure Act. *CPC Int'l, Inc.* v. *Train*, 515 F. 2d 1032, 1038 (1975) (*CPC I*). It has been suggested, however, that even if the EPA regulations are considered to be only § 304 guidelines, the Court of Appeals might still have ancillary jurisdiction to review them because of their close relationship with the § 301 effluent limitations, and because they were developed on the same record as the § 306 standards of performance for new plants, which are directly reviewable in the Court of Appeals.

[15] The Courts of Appeals have resolved these issues in various ways. Only the Eighth Circuit, the first to consider the issues, has accepted the industry position. In *CPC I*, *supra*, it held that EPA lacked the authority to issue effluent-limitation regulations and that jurisdiction to review the regulations as § 304 guidelines was in the District Court. The Fourth Circuit, in *Du Pont II*, *supra*, and the Tenth Circuit, in *American Petroleum Institute* v. *EPA*, 540 F. 2d 1023 (1976), held that EPA has the authority to issue effluent-limitation regulations, but that these regulations are only presumptively applicable to individual sources. The majority position, adopted by the Third Circuit, *American Iron & Steel Institute* v. *EPA*, 526 F. 2d 1027 (1975); the Seventh Circuit, *American Meat Institute* v. *EPA*, 526 F. 2d 442 (1975); the District of Columbia Circuit, *American Frozen Food Institute* v. *Train*, 176 U. S. App. D. C. 105, 539 F. 2d 107 (1976); and the Second Circuit, *Hooker Chemicals & Plastics Corp.* v. *Train*, 537 F. 2d 620 (1976), is that EPA has the authority to issue regulations setting forth effluent limitations which individual plants may not exceed. Even these courts are not in complete agreement about the form the regulations should take. The commentators have also divided on these problems. See Parenteau & Tauman, The Effluent Limitations Controversy, 6 Ecology L. Q. 1 (1976); Note, Judicial Maelstrom in Federal Waters, 45 Ford. L. Rev. 625 (1976); Comment,

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We think § 301 itself is the key to the problem. The statutory language concerning the 1983 limitations, in particular, leaves no doubt that these limitations are to be set by regulation. Subsection (b)(2)(A) of § 301 states that by 1983 "effluent limitations *for categories and classes* of point sources" are to be achieved which will require "application of the best available technology economically achievable *for such category or class.*" (Emphasis added.) These effluent limitations are to require elimination of all discharges if "such elimination is technologically and economically achievable for a *category or class* of point sources." (Emphasis added.) This is "language difficult to reconcile with the view that in-

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The Application of Effluent Limitations and Effluent Guidelines to Industrial Polluters, 13 Houst. L. Rev. 348 (1976); Note, Effective National Regulation of Point Sources Under the 1972 Federal Water Pollution Control Act, 10 Ga. L. Rev. 983 (1976).

The difference in opinion among the Circuits may be less significant than might appear. The Eighth Circuit has concluded:

"Under our ruling, the limitations written into individual permits for existing point sources should be substantially similar to those written into permits if the EPA's theory of the Act were to be adopted.

"The only practical difference resulting from this Court's interpretation of the statute is that the § 304 (b) guidelines for *existing* sources must be reviewed first in the District Court, while the § 306 (b) standards of performance for *new* plants—often based on the same scientific research and conclusions—must be reviewed first in the Court of Appeals." *CPC Int'l, Inc.* v. *Train*, 540 F. 2d 1329, 1331–1332, n. 1 (1976) (*CPC II*). See also *American Meat Institute, supra*, at 449 n. 14.

While this Court has not had occasion to rule directly on this question, our discussion of the Act in a case decided last Term is suggestive of the answer. We then described § 402 permits as "serv[ing] to transform *generally applicable effluent limitations* . . . into the obligations (including a timetable for compliance) of the individual discharger . . . ." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S., at 205 (emphasis added). This description clearly implied that effluent limitations of general application are to be established before individual permits are issued.

dividual effluent limitations are to be set when each permit is issued." *American Meat Institute* v. *EPA*, 526 F. 2d 442, 450 (CA7 1975). The statute thus focuses expressly on the characteristics of the "category or class" rather than the characteristics of individual point sources.[16] Normally, such classwide determinations would be made by regulation, not in the course of issuing a permit to one member of the class.[17]

Thus, we find that § 301 unambiguously provides for the use of regulations to establish the 1983 effluent limitations. Different language is used in § 301 with respect to the 1977 limitations. Here, the statute speaks of "effluent limitations for point sources," rather than "effluent limitations for categories and classes of point sources." Nothing elsewhere in the Act, however, suggests any radical difference in the mechanism used to impose limitations for the 1977 and 1983 deadlines. See *American Iron & Steel Institute* v. *EPA*, 526 F. 2d 1027, 1042 n. 32 (CA3 1975). For instance, there is no indication in either § 301 or § 304 that the § 304 guidelines play a different role in setting 1977 limitations. Moreover, it would be highly anomalous if the 1983 regulations and the new-source standards[18] were directly reviewable in the Court of

[16] The Court of Appeals noted that "[t]he 1983 and new source requirements are on the basis of categories." *Du Pont II*, 541 F. 2d, at 1029.

[17] Furthermore, § 301 (c) provides that the 1983 limitations may be modified if the owner of a plant shows that "such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." This provision shows that the § 301 (b) limitations for 1983 are to be established prior to consideration of the characteristics of the individual plant. *American Iron & Steel Institute* v. *EPA*, *supra*, at 1037 n. 15. Moreover, it shows that the term "best technology economically achievable" does not refer to any individual plant. Otherwise, it would be impossible for this "economically achievable" technology to be beyond the individual owner's "economic capability."

[18] Section 509 (b) (1) (A) makes new-source standards directly reviewable in the court of appeals. The Court of Appeals in this litigation did not believe that Congress "intended for review to be bifurcated," with the

Appeals, while the 1977 regulations based on the same administrative record were reviewable only in the District Court. The magnitude and highly technical character of the administrative record involved with these regulations makes it almost inconceivable that Congress would have required duplicate review in the first instance by different courts. We conclude that the statute authorizes the 1977 limitations as well as the 1983 limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations.[19]

The question of the form of § 301 limitations is tied to the question whether the Act requires the Administrator or the permit issuer to establish the limitations. Section 301 does not itself answer this question, for it speaks only in the passive voice of the achievement and establishment of the limitations. But other parts of the statute leave little doubt on this score. Section 304 (b) states that "[f]or the purpose of adopting or revising effluent limitations . . . the Administrator shall" issue guideline regulations; while the judicial-review section, § 509 (b)(1), speaks of "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 301 . . . ." See *infra*, at 136–137. And § 101 (d) requires us to resolve any ambiguity on this score in favor of the Administrator. It provides that "[e]xcept as otherwise *expressly* provided in this Act, the

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new-source standards reviewable in a different forum than regulations governing existing sources. 528 F. 2d, at 1141. The Eighth Circuit has acknowledged the practical problems and potential for inconsistent rulings created by bifurcated review. *CPC II*, *supra*, at 1332 n. 1. We consider it unlikely that Congress intended such bifurcated review, and even less likely that Congress intended regulations governing existing sources to be reviewable in two different forums, depending on whether the regulations require compliance in 1977 or 1983.

[19] We agree with the Court of Appeals, 541 F. 2d, at 1028, that consideration of whether EPA's variance provision has the proper scope would be premature.

Administrator of the Environmental Protection Agency . . . shall administer this Act." (Emphasis added.) In sum, the language of the statute supports the view that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations.

The legislative history supports this reading of § 301. The Senate Report states that "pursuant to subsection 301 (b)(1)(A), and Section 304 (b)" the Administrator is to set a base level for all plants in a given category, and "[i]n no case . . . should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level." S. Rep. No. 92–414, p. 50 (1971), Leg. Hist. 1468.[20] The Conference Report on § 301 states that "the determination of the economic impact of an effluent limitation [will be made] on the basis of classes and categories of point sources, as distinguished from a plant by plant determination." Sen. Conf. Rep. No. 92–1236, p. 121 (1972), Leg. Hist. 304. In presenting the Conference Report to the Senate, Senator Muskie, perhaps the Act's primary author, emphasized the importance of uniformity in setting § 301 limitations. He explained that this goal of uniformity required that EPA focus on classes or categories of sources in formulating effluent limitations. Regarding the requirement contained in § 301 that plants use the "best practicable control technology" by 1977, he stated:

> "The modification of subsection 304 (b)(1) is intended to clarify what is meant by the term 'practicable.' The balancing test between total cost and effluent reduction

[20] All citations to the legislative history are to Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973).

benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for *any class or category* of sources.

"The Conferees agreed upon this limited cost-benefit analysis in order to maintain *uniformity within a class and category* of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community." 118 Cong. Rec. 33696 (1972), Leg. Hist. 170 (emphasis added).

He added that:

"The Conferees intend that the factors described in section 304 (b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class." 118 Cong. Rec. 33697 (1972), Leg. Hist. 172.

This legislative history supports our reading of § 301 and makes it clear that the § 304 guidelines are not merely aimed at guiding the discretion of permit issuers in setting limitations for individual plants.

What, then, is the function of the § 304 (b) guidelines? As we noted earlier, § 304 (b) requires EPA to identify the amount of effluent reduction attainable through use of the best practicable or available technology and to "specify factors to be taken into account" in determining the pollution control methods "to be applicable to point sources . . . within such categories or classes." These guidelines are to be issued "[f]or the purpose of adopting or revising effluent limitations

under this Act." [21] As we read it, § 304 requires that the guidelines survey the practicable or available pollution-control technology for an industry and assess its effectiveness. The guidelines are then to describe the methodology EPA intends to use in the § 301 regulations to determine the effluent limitations for particular plants. If the technical complexity of the task had not prevented EPA from issuing the guidelines within the statutory deadline,[22] they could have provided valuable

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[21] Petitioners rely heavily on selected portions of the following passage from the Senate Report to support their view of § 301:

"It is the Committee's intention that pursuant to subsection 301 (b) (1)(A), and Section 304 (b) the Administrator will interpret the term 'best practicable' when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by January 1, 1976 [now July 1, 1977]. In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case, however, should any plant be allowed to discharge more pollutants per unit of production than is defined by that base level.

"The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." S. Rep. No. 92–414, p. 50 (1971), Leg. Hist. 1468.

If construed to be consistent with the legislative history we have already discussed, and with what we have found to be the clear statutory language, this language can be fairly read to allow the use of subcategories based on factors such as size, age, and unit processes, with effluent limitations for each subcategory normally based on the performance of the best plants in that subcategory.

[22] As the Court of Appeals held, 541 F. 2d, at 1027, EPA's response to this problem was within its discretion. Accord, *American Frozen Food Institute* v. *Train*, 176 U. S. App. D. C., at 128–129, 539 F. 2d, at 130–131. Even if we considered this course to constitute a procedural error,

guidance to permit issuers, industry, and the public, prior to the issuance of the § 301 regulations.[23]

Our construction of the Act is supported by § 501 (a), which gives EPA the power to make "such regulations as are necessary to carry out" its functions, and by § 101 (d), which charges the agency with the duty of administering the Act. In construing this grant of authority, as Mr. Justice Harlan wrote in connection with a somewhat similar problem:

> "'[C]onsiderations of feasibility and practicality are certainly germane' to the issues before us. *Bowles* v. *Willingham*, [321 U. S. 503,] 517. We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." *Permian Basin Area Rate Cases*, 390 U. S. 747, 777.

The petitioners' view of the Act would place an impossible burden on EPA. It would require EPA to give individual consideration to the circumstances of each of the more than 42,000 dischargers who have applied for permits, Brief for Re-

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it would not invalidate the § 301 regulations themselves since the purposes for issuing the guidelines were substantially achieved, see n. 23, *infra*, and no prejudice has been shown.

[23] The guidelines could have served at least three functions. First, they would have provided guidance to permit issuers prior to promulgation of the § 301 effluent limitation regulations. Second, they would have given industry more time to prepare to meet the § 301 regulations. Third, they would have afforded a greater opportunity for public input into the final § 301 regulations, by giving notice of the general outlines of those regulations. These functions were substantially served by EPA's practice of obtaining public comment on the development document and proposed regulations. In addition, the guidelines could furnish technical guidance to companies lacking expertise in pollution control by informing them of appropriate control methods. See S. Rep. No. 92–414, p. 45 (1971), Leg. Hist. 1463. This function is served by the Development Document and supporting materials.

spondents in No. 75–978, p. 30 n. 22, and to issue or approve all these permits well in advance of the 1977 deadline in order to give industry time to install the necessary pollution-control equipment. We do not believe that Congress would have failed so conspicuously to provide EPA with the authority needed to achieve the statutory goals.

Both EPA and petitioners refer to numerous other provisions of the Act and fragments of legislative history in support of their positions. We do not find these conclusive, and little point would be served by discussing them in detail. We are satisfied that our reading of § 301 is consistent with the rest of the legislative scheme.[24]

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[24] See *American Iron & Steel Institute* v. *EPA*, 526 F. 2d, at 1037–1041; *American Meat Institute* v. *EPA*, 526 F. 2d, at 450–452; *American Frozen Food Institute* v. *Train*, 176 U. S. App. D. C., at 114–129, 539 F. 2d, at 116–131. As these courts have noted, a number of provisions of the Act seem to assume that § 301 effluent limitations have some existence apart from § 402 permits. Section 301 (a) makes any discharge unlawful "[e]xcept as in compliance with this section and sectio[n] . . . 402 . . . of this Act." Similarly, § 509 (b), the judicial-review provision, refers separately to the Administrator's action "(E) in approving or promulgating any effluent limitation or other limitation under section 301 . . . and (F) in issuing or denying any permit under section 402." Likewise, § 505 (f) defines "effluent standard or limitation" for purposes of the citizen-enforcement provision of the Act, to include "(2) an effluent limitation or other limitation under section 301 or 302 of this Act," and "(6) a permit or condition thereof issued under section 402 of this Act." The legislative history also recognizes a distinction between permit conditions and § 301 limitations. For instance: "The [House] Committee further recognizes that the requirements under sectio[n] 301 . . . will not all be promulgated immediately upon enactment of this bill. Nevertheless, it would be unreasonable to delay issuing of permits until all the implementing steps are necessary." H. R. Rep. No. 92–911, p. 126 (1972), Leg. Hist. 813.

These Court of Appeals decisions have also thoroughly considered the arguments the Eighth Circuit found to be persuasive. The most important contrary arguments are these:

(1) The Eighth Circuit was impressed by the differences between § 301 and sections explicitly authorizing EPA to issue regulations. These dif-

Language we recently employed in another case involving the validity of EPA regulations applies equally to this case:

> "We therefore conclude that the Agency's interpretation . . . was 'correct,' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation

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ferences are less than the Eighth Circuit believed. For instance, the Eighth Circuit stressed that the explicitly authorized regulations were referred to as "standards," and that this term is not used in § 301. *CPC I*, 515 F. 2d, at 1038. But § 316 (b) refers to "[a]ny standard established pursuant to section 301." Other differences between § 301 and sections providing explicitly for enforceable regulations, such as the lack of any statutory timetable for § 301 limitations, can be explained on the basis of the greater difficulty of drafting § 301 regulations.

(2) There was heated debate in Congress concerning whether EPA should be able to veto individual state permits, as the Act now provides. The Eighth Circuit believed that "creation of the veto power would make no sense if the EPA was already empowered to promulgate regulations under § 301." *CPC I*, *supra*, at 1040–1041. We disagree. "[A] veto power could have been considered just as necessary to ensure compliance by the permit grantors with section 301 limitations as with section 304 guidelines." *American Iron & Steel Institute*, *supra*, at 1041. The veto power would be especially important because large numbers of permits could be issued before the § 301 regulations were promulgated. During this interim period, inconsistency with the § 304 (b) guidelines could be a ground for vetoing a permit. (Moreover, we disagree with the Eighth Circuit's contention that EPA's power to object to "the issuance of such permit as being outside the guidelines and requirements of this Act," § 402 (d) (2), can only refer to § 304 (b) guidelines. *CPC I*, *supra*, at 1038–1039. Section 304 (h) provides for guidelines governing the procedure for issuance of permits; EPA can veto a permit if "the issuance of such permit" violated these guidelines.)

We are also unconvinced by the argument that our view of the Act violates the congressional intent to leave the States a major role in controlling water pollution. See *American Meat Institute*, *supra*, at 452.

> by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency." *Train* v. *Natural Resources Def. Council*, 421 U. S. 60, 87.[25]

When, as in this litigation, the Agency's interpretation is also supported by thorough, scholarly opinions written by some of our finest judges, and has received the overwhelming support of the Courts of Appeals, we would be reluctant indeed to upset the Agency's judgment. Here, on the contrary, our independent examination confirms the correctness of the Agency's construction of the statute.[26]

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[25] Petitioners contend that the administrative construction should not receive deference because it was not contemporaneous with the passage of the Act. They base this argument primarily on the fact that EPA's initial notices of its proposed rulemaking refer to § 304 (b), rather than § 301, as the source of authority. But this is merely evidence that the Administrator originally intended to issue guidelines prior to issuing effluent limitation regulations. *American Frozen Food Institute* v. *Train*, *supra*, at 128 n. 6, 539 F. 2d, at 130 n. 6. In fact, in a letter urging the President to sign the Act, the Administrator stated that "[t]he Conference bill fully incorporates as its central regulatory point the Administration's proposal concerning *effluent limitations in terms of industrial categories and groups* ultimately applicable to individual dischargers through a permit system." 118 Cong. Rec. 36777 (1972), Leg. Hist. 149 (emphasis added). Finally, the EPA interpretation would be entitled to some deference even if it was not contemporaneous, "having in mind the complexity and technical nature of the statutes and the subjects they regulate, the obscurity of the statutory language, and EPA's unique experience and expertise in dealing with the problems created by these conditions." *American Meat Institute* v. *EPA*, *supra*, at 450 n. 16.

[26] This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view.

Consequently, we hold that EPA has the authority to issue regulations setting forth uniform effluent limitations for categories of plants.

II

Our holding that § 301 does authorize the Administrator to promulgate effluent limitations for classes and categories of existing point sources necessarily resolves the jurisdictional issue as well. For, as we have already pointed out, § 509 (b)(1) provides that "[r]eview of the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business . . . ."

Petitioners have argued that the reference to § 301 was intended only to provide for review of the grant or denial of an individual variance pursuant to § 301 (c). We find this argument unpersuasive for two reasons in addition to those discussed in Part I of this opinion. First, in other portions of § 509, Congress referred to specific subsections of the Act and presumably would have specifically mentioned § 301 (c) if only action pursuant to that subsection were intended to be reviewable in the court of appeals. More importantly, petitioners' construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions. See *American Meat Institute* v. *EPA*, 526 F. 2d, at 452.

We regard § 509 (b)(1)(F) as unambiguously authorizing court of appeals review of EPA action promulgating an effluent limitation for existing point sources under § 301. Since those limitations are typically promulgated in the same proceeding as the new-source standards under § 306, we have no

doubt that Congress intended review of the two sets of regulations to be had in the same forum.[27]

III

The remaining issue in this case concerns new plants. Under § 306, EPA is to promulgate "regulations establishing Federal standards of performance for new sources . . . ." § 306 (b)(1)(B). A "standard of performance" is a "standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, . . . including, where practicable, a standard permitting no discharge of pollutants." § 306 (a)(1). In setting the standard, "[t]he Administrator may distinguish among classes, types, and sizes within categories of new sources . . . and shall consider the type of process employed (including whether batch or continuous)." § 306 (b)(2). As the House Report states, the standard must reflect the best technology for "that category of sources, and for class, types, and sizes within categories." H. R. Rep. No. 92–911, p. 111 (1972), Leg. Hist. 798.

The Court of Appeals held:

> "Neither the Act nor the regulations contain any variance provision for new sources. The rule of presumptive applicability applies to new sources as well

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[27] It should be noted that petitioners' principal arguments are directed to the proposition that § 301 did not *mandate* the promulgation of industrywide regulations for existing point sources. But that ultimate proposition is not necessarily inconsistent with EPA's position that it was *authorized* to proceed by regulation if the aggregate effect of thousands of individual permit proceedings would not achieve the required effluent limitations by the 1977 and 1983 deadlines. Even with respect to the permit programs authorized by § 402, it is clear that EPA can delegate responsibilities to the States without surrendering its ultimate authority over such programs as well as over individual permit actions.

> as existing sources. On remand EPA should come forward with some limited escape mechanism for new sources." *Du Pont II*, 541 F. 2d, at 1028.

The court's rationale was that "[p]rovisions for variances, modifications, and exceptions are appropriate to the regulatory process." *Ibid.*

The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations. It is clear that Congress intended these regulations to be absolute prohibitions. The use of the word "standards" implies as much. So does the description of the preferred standard as one "permitting *no* discharge of pollutants." (Emphasis added.) It is "unlawful for *any* owner or operator of *any* new source to operate such source in violation of any standard of performance applicable to such source." § 306 (e) (emphasis added). In striking contrast to § 301 (c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and "maximum feasible control of new sources." S. Rep. No. 92–414, p. 58 (1971), Leg. Hist. 1476.[28]

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[28] Petitioners attach some significance to the fact that compliance with a § 402 permit is "deemed compliance, for purposes of sections 309 [the federal enforcement section] and 505 [the citizen suit section], with sectio[n] . . . 306 . . . ." § 402 (k). This provision plainly cannot allow deviations from § 306 standards in issuing the permit. For, after standards of performance are promulgated, the permit can only be issued "upon condition that such discharge will meet . . . all applicable requirements under sectio[n] . . . 306 . . ." § 402 (a)(1); and one of the requirements of § 306 is that no new source may operate in violation of any standard of performance. § 306 (e). The purpose of § 402 (k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402 (k) serves the purpose of giving permits finality.

That portion of the judgment of the Court of Appeals in 541 F. 2d 1018 requiring EPA to provide a variance procedure for new sources is reversed. In all other aspects, the judgments of the Court of Appeals are affirmed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

UNITED STATES *v.* FLORIDA ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 54, Orig. Argued January 17, 1977—Decided February 23, 1977

Exceptions to Special Master's report overruled, and motion to file counterclaim denied.

William F. Sheehan III argued the cause for the United States in support of the Report of the Special Master. With him on the brief were *Solicitor General Bork, Assistant Attorney General Taft, Bruce C. Rashkow,* and *Ralph J. Gillis.*

Lee C. Clyburn, Assistant Attorney General of Texas, and *Sidney H. McKenzie III,* Assistant Deputy Attorney General of Florida, argued the cause for defendants on exceptions to the Report of the Special Master. With *Mr. Clyburn* on the briefs were *John L. Hill,* Attorney General of Texas, *David M. Kendall,* First Assistant Attorney General, *Robert L. Shevin,* Attorney General of Florida, and *Donna B. Stinson,* Assistant Attorney General.

PER CURIAM.

The exceptions of the States of Florida and Texas to the Report of the Special Master, 429 U. S. 810 (1976), are overruled and the motion for leave to file a counterclaim is denied.

So ordered.

CITY OF PHILADELPHIA ET AL. v. NEW JERSEY ET AL.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 75-1150. Argued November 3, 1976—Decided February 23, 1977

New Jersey Supreme Court's judgment that New Jersey statute prohibiting the bringing into the State of solid or liquid waste originating or collected elsewhere was not pre-empted by the Federal Solid Waste Disposal Act of 1965, and was not unconstitutional as a discrimination against or an undue burden on interstate commerce, is vacated and the case is remanded for reconsideration of the pre-emption question in light of the subsequently enacted Federal Resource Conservation and Recovery Act of 1976.

68 N. J. 451, 348 A. 2d 505, vacated and remanded.

Herbert F. Moore argued the cause for appellants. With him on the briefs were *Arthur Meisel* and *John R. Padova.*

Stephen Skillman, Assistant Attorney General of New Jersey, argued the cause for appellees. With him on the brief were *William F. Hyland,* Attorney General, and *Mark L. First,* Deputy Attorney General.*

PER CURIAM.

This suit challenges the constitutionality of a New Jersey statute prohibiting any person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the territorial limits of the State," except garbage to be fed to swine. 1973 N. J. Laws, c. 363. The New Jersey Supreme Court held that the Act was not pre-empted by a federal statute addressing questions of waste disposal, the

M. Jerome Diamond, Attorney General of Vermont, *Benson D. Scotch,* Assistant Attorney General, *David H. Souter,* Attorney General of New Hampshire, and *Donald W. Stever, Jr.,* Assistant Attorney General, filed a brief for the States of Vermont and New Hampshire as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Louis L. Meier, Jr.,* for the American Society of Civil Engineers, and by *William C. Brashares* for the National Solid Wastes Management Assn.

Solid Waste Disposal Act of 1965, 79 Stat. 997, 42 U. S. C. § 3251 *et seq.* (1970 ed. and Supp. V), and was not unconstitutional as discriminating against or placing an undue burden on interstate commerce. *Hackensack Meadowlands Dev. Comm'n* v. *Municipal Sanitary Landfill Authority*, 68 N. J. 451, 348 A. 2d 505 (1975). We noted probable jurisdiction on April 5, 1976, 425 U. S. 910.

On October 21, 1976, the Resource Conservation and Recovery Act of 1976, 90 Stat. 2795, 42 U. S. C. § 6901 *et seq.* (1976 ed.), became law. The parties at the Court's request supplemented their briefs to address the question of the impact of the new federal statute on the New Jersey Act. Appellants argue that the Federal Act displaces the New Jersey law, and appellees argue that it does not pre-empt or in any way undercut the validity of the New Jersey legislation. While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute. The judgment of the New Jersey Supreme Court is therefore vacated, and the case is remanded for reconsideration in light of that Act.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6901 *et seq.* (1976 ed.), evidences a federal con-

cern with the growing problem of waste disposal in this country. This complex statute attempts to deal with this problem in a variety of ways. Because the impact of the statute will depend in part on the regulations promulgated under it, generalizations at this time as to the effect of the statute should be made with caution. But I do think it is abundantly clear from the text of the statute and from its legislative history that Congress did not intend to pre-empt state laws such as the one at issue here. In its report on the statute the House Committee on Interstate and Foreign Commerce recognized the existence of state laws similar to this New Jersey law. H. R. Rep. No. 94–1491, pp. 3, 10 (1976). The report explicitly disclaimed any pre-emptive intention.

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.*, at 33.

In view of this express disclaimer, I do not understand how the Court can assume that pre-emption remains an open question.

We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty.

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75-104. Argued October 6, 1976—Decided March 1, 1977

After New York State had submitted for the approval of the Attorney General its 1972 reapportionment statute with respect to Kings County and two other counties which were subject to §§ 4 and 5 of the Voting Rights Act of 1965, he concluded that as to certain districts in Kings County the State had not met its burden under § 5 of demonstrating that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color. In May 1974 the State submitted to the Attorney General a revision of those portions of the 1972 plan to which he had objected, including provisions for elections to the state senate and assembly from Kings County. The 1974 plan did not change the number of districts with nonwhite majorities but did change the size of the nonwhite majorities in most of those districts. To attain a nonwhite majority of 65%, which it was felt would be acceptable to the Attorney General for the assembly district in which the Hasidic Jewish community was located (which had been 61% nonwhite under the 1972 plan), a portion of the white population, including part of the Hasidic community, was reassigned to an adjoining district, and that community was also split between two senatorial districts though it had been within one such district under the 1972 plan. Petitioners, on behalf of the Hasidic community, brought this suit for injunctive and declaratory relief, alleging that the 1974 plan violated their rights under the Fourteenth and Fifteenth Amendments. Petitioners contended that the plan "would dilute the value of [their] franchise by halving its effectiveness," solely for the purpose of achieving a racial quota, and that they were assigned to electoral districts solely on the basis of race. Upon motions by the Attorney General (who had advised the State that he did not object to the 1974 plan) and an intervenor, the District Court dismissed the complaint, holding that petitioners enjoyed no constitutional right in reapportionment to separate community recognition as Hasidic Jews; that the redistricting did not disenfranchise them; and that racial considerations were permissible to correct past discrimination. The Court

of Appeals affirmed. Noting that the 1974 plan left approximately 70% of the Kings County senate and assembly districts with white majorities and that only 65% of the county was white, the court held that the plan would not underrepresent the white population. The court, relying on *Allen* v. *State Board of Elections*, 393 U. S. 544, 569, concluded that a State could use racial considerations in an effort to secure the approval of the Attorney General under the Voting Rights Act, reasoning that the Act contemplated that he and the state legislature would have "to think in racial terms"; because the Act "necessarily deals with race or color, corrective action under it must do the same." *Held:* The judgment is affirmed. Pp. 155–168; 179–180.

510 F. 2d 512, affirmed.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded that the use of racial criteria by the State of New York in its 1974 plan in attempting to comply with § 5 of the Act and to secure the approval of the Attorney General did not violate the Fourteenth or Fifteenth Amendment. Pp. 155–165.

(a) Under § 5, new or revised reapportionment plans are among those voting procedures, standards, or practices that may not be adopted by a State covered by the Act without a ruling by the Attorney General or the specified court that the plan does not have a racially discriminatory purpose or effect. *Allen* v. *State Board of Elections*, *supra*. Pp. 157–159.

(b) Compliance with the Act in reapportionment cases will often necessitate the use of racial considerations in drawing district lines, and the Constitution does not prevent a State subject to the Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. *Beer* v. *United States*, 425 U. S. 130; *City of Richmond* v. *United States*, 422 U. S. 358. Pp. 159–161.

(c) Permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment. P. 161.

(d) A reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. P. 162.

(e) Petitioners have not shown or offered to prove that minority voting strength was increased under the 1974 plan in comparison with the 1966 apportionment and thus have not shown that New York did more than the Attorney General was authorized to require it to do under

the nonretrogression principle of *Beer* v. *United States*, *supra*, a principle that this Court has accepted as constitutionally valid. Pp. 162–165.

MR. JUSTICE WHITE, joined by MR. JUSTICE STEVENS and MR. JUSTICE REHNQUIST, concluded that, wholly aside from New York's obligations under the Act to preserve minority voting strength in Kings County, the Constitution permits the State to draw lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county. Though in individual districts where nonwhite majorities were increased to about 65% it became more likely that nonwhite candidates would be elected, as long as Kings County whites, as a group, were provided with fair representation, there was no cognizable discrimination against whites. See *Gaffney* v. *Cummings*, 412 U. S. 735, 754. Pp. 165–168.

MR. JUSTICE STEWART, joined by MR. JUSTICE POWELL, concluded that, having failed to show that the 1974 plan had either the purpose or effect of discriminating against them because of their race, petitioners, who erroneously contend that racial awareness in legislative reapportionment is unconstitutional *per se*, have offered no basis for affording them the constitutional relief that they seek. Pp. 179–180.

WHITE, J., announced the Court's judgment, and delivered an opinion in which STEVENS, J., joined; in all but Part IV of which BRENNAN and BLACKMUN, JJ., joined; and in Parts I and IV of which REHNQUIST, J., joined. BRENNAN, J., filed an opinion concurring in part, *post*, p. 168. STEWART, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post*, p. 179. BURGER, C. J., filed a dissenting opinion, *post*, p. 180. MARSHALL, J., took no part in the consideration or decision of the case.

Nathan Lewin argued the cause and filed a brief for petitioners.

George D. Zuckerman, Assistant Attorney General of New York, argued the cause for respondents Carey et al. With him on the brief were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General. *Solicitor General Bork* argued the cause for the United States. With him on the brief were *Assistant Attorney General Pottinger*, *Deputy Solicitor General Wallace*, *John P. Rupp*, *Brian K. Landsberg*, and *William C. Graves*. *Louis H. Pollak* ar-

gued the cause for respondents NAACP et al. With him on the brief were *Jack Greenberg* and *Eric Schnapper*.*

MR. JUSTICE WHITE announced the judgment of the Court and filed an opinion in which MR. JUSTICE STEVENS joined; Parts I, II, and III of which are joined by MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN; and Parts I and IV of which are joined by MR. JUSTICE REHNQUIST.

Section 5 of the Voting Rights Act of 1965 prohibits a State or political subdivision subject to § 4 of the Act from implementing a legislative reapportionment unless it has obtained a declaratory judgment from the District Court for the District of Columbia, or a ruling from the Attorney General of the United States, that the reapportionment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." [1]

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*Briefs of *amici curiae* urging reversal were filed by *Will Maslow, Shad Polier, Larry M. Lavinsky, Arnold Forster,* and *James Lipsig* for the American Jewish Congress et al.; by *Steven M. Bernstein* and *Julius Berman* for the Board for Legal Assistance to the Jewish Poor, Inc., et al.; and by *Dennis Rapps* and *Samuel Rabinove* for the National Jewish Commission on Law and Public Affairs et al.

[1] Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, at the time in question here, provided in pertinent part:

"[W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, stand-

The question presented is whether, in the circumstances of this case, the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General violated the Fourteenth or Fifteenth Amendment.

I

Kings County, N. Y., together with New York (Manhattan) and Bronx Counties, became subject to §§ 4 and 5 of the Act, by virtue of a determination by the Attorney General that a literacy test was used in these three counties as of November 1, 1968, and a determination by the Director of the Census that fewer than 50% of the voting-age residents of these three counties voted in the Presidential election of 1968.[2] Litigation to secure exemption from the Act was unsuccessful,[3] and it became necessary for New York to

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ard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

A legislative reapportionment is a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968," within the meaning of § 5. See *infra*, at 157–159.

[2] See 42 U. S. C. § 1973b (b).

[3] The State of New York brought an action to obtain a statutory exemption for the three counties under § 4 (a) of the Act, seeking a declaratory judgment that its literacy test had not been used within the 10 years preceding the filing of the suit "for the purpose or with the effect of denying or abridging the right to vote on account of race or

secure the approval of the Attorney General or of the United States District Court for the District of Columbia for its 1972 reapportionment statute insofar as that statute concerned Kings, New York, and Bronx Counties. On January 31, 1974, the provisions of the statute districting these counties for congressional, state senate, and state assembly seats were submitted to the Attorney General. In accordance with the regulations governing his § 5 review, the Attorney General considered submissions from interested parties criticizing and defending the plan.[4] Those submissions included assertions that voting in these counties was racially polarized and that the district lines had been created with the purpose or effect of diluting the voting strength of

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color." 42 U. S. C. § 1973b (a). After several years of litigation, the District Court for the District of Columbia denied the exemption and ordered the State to comply with the filing requirements of § 5. This Court summarily affirmed. *New York ex rel. New York County* v. *United States*, 419 U. S. 888 (1974). See 510 F. 2d 512, 516 (CA2 1975).

[4] Title 28 CFR § 51.19 (1976) provides:

"Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

nonwhites (blacks and Puerto Ricans).[5] On April 1, 1974, the Attorney General concluded that, as to certain districts in Kings County covering the Bedford-Stuyvesant area of Brooklyn, the State had not met the burden placed on it by § 5 and the regulations thereunder to demonstrate that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color.[6]

Under § 5, the State could have challenged the Attorney General's objections to the redistricting plan by filing a

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[5] The record in this Court contains only part of the materials submitted to and considered by the Attorney General in his review of the 1972 plan. Included in the present record are a memorandum submitted on behalf of the National Association for the Advancement of Colored People and letters from several prominent black and Puerto Rican elected officials, all opposing the plan. Not included in the record are materials defending the plan submitted by the reapportionment committee of the New York Legislature, the State Attorney General, and several state legislators. Brief for United States 8, and n. 9.

The NAACP, the Attorney General, and the court below classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the Voting Rights Act. Hereinafter we use the term "nonwhite" to refer to blacks and Puerto Ricans, although small numbers of other nonwhite groups (such as Orientals) are also included in the nonwhite population statistics.

[6] The basis for the Attorney General's conclusion that "the proscribed effect may exist" as to certain state assembly and senate districts in Kings County was explained in a letter to the New York State authorities as follows:

"Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. . . . [W]e know of no necessity for such configuration and believe other rational alternatives exist." App. 15.

The Attorney General also objected to the congressional districting in Kings County and to the state legislative districting in New York County. The districting for these seats is not at issue in this litigation.

declaratory judgment action in a three-judge court in the District of Columbia. Instead, the State sought to meet what it understood to be the Attorney General's objections and to secure his approval in order that the 1974 primary and general elections could go forward under the 1972 statute.[7] A revised plan, submitted to the Attorney General on May 31, 1974, in its essentials did not change the number of districts with nonwhite majorities, but did change the size of the nonwhite majorities in most of those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite.[8] As for state assembly districts, both the 1972 and the 1974 plans provided for seven districts with nonwhite majorities. However, under the 1972 plan, there were four between 85% and 95% nonwhite, and three were approximately 76%, 61%, and 52%, respectively; under the 1974 plan, the two smallest nonwhite majorities were increased to 65% and 67.5%, and the two largest nonwhite majorities were decreased from greater than

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[7] The State was also under pressure from a private suit to compel enactment of new district lines consistent with the views of the Attorney General. *NAACP* v. *New York City Bd. of Elections*, 72 Civ. 1460 (SDNY). See 510 F. 2d, at 517 n. 6.

[8] The 1972 percentages are taken from Table 3, accompanying the memorandum in support of the motions to dismiss of the applicants for intervention, App. 265, except for the 61% figure, which is for a district only partially in Kings County. That figure is taken from the Brief for United States 53, and represents the black and Puerto Rican population rather than all nonwhites. The 1974 percentages are taken from the Interim Report of the Joint Committee on Reapportionment, App. 179–180.

The 1974 plan created nonwhite majorities in two state senate districts that were majority white under the 1972 plan (the 17th and the 23d), but created white majorities in two districts that were majority nonwhite under the 1972 plan (the 16th and the 25th). See Brief for United States 53.

90% to between 80% and 90%.[9] The report of the legislative committee on reapportionment stated that these changes were made "to overcome Justice Department objections" by creating more "substantial nonwhite majorities" in two assembly districts and two senate districts.[10]

One of the communities affected by these revisions in the Kings County reapportionment plan was the Williamsburgh area, where about 30,000 Hasidic Jews live. Under the 1972 plan, the Hasidic community was located entirely in one assembly district (61% nonwhite) and one senate district (37% nonwhite); in order to create substantial nonwhite majorities in these districts, the 1974 revisions split the Hasidic community between two senate and two assembly districts. A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he "got the feeling . . . that 65 percent would be probably an approved figure" for the nonwhite population in the assembly district in which the Hasidic community was located, a district approximately 61% nonwhite under the 1972 plan.[11] To attain the 65% figure, a portion of the white population, including part of the Hasidic community, was reassigned to an adjoining district.

Shortly after the State submitted this revised redistricting plan for Kings County to the Attorney General, petitioners sued on behalf of the Hasidic Jewish community of Williamsburgh, alleging that the 1974 plan "would dilute the value of each plaintiff's franchise by halving its effectiveness," solely for the purpose of achieving a racial quota and therefore

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[9] Table 3, *supra*, n. 8, App. 266; Interim Report, *supra*, n. 8, App. 195; Brief for United States 54. See 510 F. 2d, at 523 n. 21.

[10] Interim Report, *supra*, n. 8, App. 179; see *id.*, at 181–182.

[11] Testimony of Richard S. Scolaro, executive director of the Joint Committee on Reapportionment, at hearing on plaintiff's motion for preliminary injunction, App. 106; see 510 F. 2d, at 517.

in violation of the Fourteenth Amendment. Petitioners also alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment. Petitioners sought an injunction restraining New York officials from enforcing the new redistricting plan and a declaratory judgment that the Attorney General of the United States had used unconstitutional and improper standards in objecting to the 1972 plan.

On June 20, 1974, the District Court held a hearing on petitioners' motion for a preliminary injunction. On July 1, 1974, the Attorney General informed the State of New York that he did not object to the implementation of the revised plan. The Attorney General moved to be dismissed as a party on the ground that the relief sought against him could be obtained only in the District Court for the District of Columbia and only by a State or political subdivision subject to the Voting Rights Act; the State and the intervenor NAACP moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The District Court granted the motions to dismiss the complaint, reasoning that petitioners enjoyed no constitutional right in reapportionment to separate community recognition as Hasidic Jews, that the redistricting did not disenfranchise petitioners, and that racial considerations were permissible to correct past discrimination.[12] *United Jewish Organizations* v. *Wilson*, 377 F. Supp. 1164, 1165–1166 (EDNY 1974).

A divided Court of Appeals affirmed. 510 F. 2d 512 (CA2 1975). The majority first held that the Attorney General had to be dismissed as a party because the court had no jurisdiction to review his objection to the 1972 plan.[13] After agree-

[12] Petitioners' motions for a preliminary injunction and summary judgment were denied.

[13] Although petitioners did not present this question for review, they argue that the Attorney General is properly a party to this suit because

ing with the District Court that petitioners had no constitutional right to separate community recognition in reapportionment—a holding not challenged by petitioners here [14]—the Court of Appeals went on to address petitioners' claims as white voters that the 1974 plan denied them equal protection of the laws and abridged their right to vote on the basis of race. The court noted that the 1974 plan left approximately 70% of the senate and assembly districts in Kings County with white majorities; given that only 65% of the population of the county was white, the 1974 plan would not underrepresent the white population, assuming that voting followed racial lines. *Id.*, at 523, and n. 21. Petitioners thus could not claim that the plan canceled out the voting strength of whites as a racial group, under this Court's decisions in *White* v. *Regester*, 412 U. S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971). The court then observed that the case did not present the question whether a legislature, "starting afresh," could draw lines on a racial basis so as to bolster nonwhite voting strength, but rather the "narrower" question whether a State could use racial considerations in drawing lines in an effort to secure the Attorney General's approval under the Voting Rights Act. 510 F. 2d, at 524. The court thought this question answered by this Court's decision in *Allen* v. *State Board of Elections*, 393 U. S. 544, 569 (1969), where a change from district to at-large voting for county supervisors was held to be covered by § 5 of the Act. The

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he allegedly caused the state officials to deprive petitioners of their constitutional rights. Brief for Petitioners 53–54, n. 22; Reply Brief for Petitioners 5 n. 1 (filed Sept. 30, 1976). In view of our disposition of the case, we do not reach this issue.

[14] In this Court, petitioners state: "[We do not] contend that there is any right—constitutional or statutory—for permanent recognition of a community in legislative apportionment. Our argument is, rather, that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time." Brief for Petitioners 6 n. 6. (Emphasis in original.)

court below reasoned that the Act contemplated that the Attorney General and the state legislature would have "to think in racial terms"; because the Act *"necessarily deals with race or color, corrective action under it must do the same."* 510 F. 2d, at 525. (Emphasis in original; footnote omitted.) The court held that

> "so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite, that districting is not subject to challenge." *Ibid.*[15]

We granted certiorari, 423 U. S. 945 (1975). We affirm.

II

Petitioners argue that the New York Legislature, although seeking to comply with the Voting Rights Act as construed by the Attorney General, has violated the Fourteenth and Fifteenth Amendments by deliberately revising its reapportionment plan along racial lines.[16] In rejecting petitioners'

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[15] The dissent would have found a constitutional violation in "the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts." The dissent pointed out that neither the Attorney General nor the State of New York would take responsibility for the 65% "quota," and argued that there was no showing of a pre-existing wrong which could justify the use of a "presumptively odious" racial classification. 510 F. 2d, at 525, 526 (Frankel, J.).

[16] The Equal Protection Clause, contained in § 1 of the Fourteenth Amendment, forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

claims, we address four propositions: First, that whatever might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; second, that even if racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; third, that the use of a "racial quota" in redistricting is never acceptable; and fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional, particularly its use of a 65% nonwhite racial quota for certain districts. The first three arguments, as we now explain, are foreclosed by our cases construing and sustaining the constitutionality of the Voting Rights Act; the fourth we address in Parts III and IV.

It is apparent from the face of the Act, from its legislative history, and from our cases that the Act itself was broadly remedial in the sense that it was "designed by Congress to banish the blight of racial discrimination in voting . . . ." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). It is also plain, however, that after "repeatedly try[ing] to cope with the problem by facilitating case-by-case litigation against voting discrimination," *id.*, at 313, Congress became dissatisfied with this approach, which required judicial findings of unconstitutional discrimination in specific situations and judicially approved remedies to cure that discrimination. Instead, Congress devised more stringent measures, one of which, § 5, required the covered States to seek the approval of either the Attorney General or of a three-judge court in the District of Columbia whenever they sought to implement new voting procedures. Under § 4, a State became subject to § 5 whenever it was administratively determined that certain conditions which experience had proved

were indicative of racial discrimination in voting had existed in the area—in the case of New York, as already indicated, *supra*, at 148, that a literacy test was in use in certain counties in 1968 and that fewer than 50% of the voting-age residents in these counties voted in the Presidential election that year. At that point, New York could have escaped coverage by demonstrating to the appropriate court that the test had not been used to discriminate within the past 10 years, which New York was unable to do. See n. 3, *supra*.

Given this coverage of the counties involved, it is evident that the Act's prohibition against instituting new voting procedures without the approval of the Attorney General or the three-judge District Court is not dependent upon proving past unconstitutional apportionments and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court. Although recognizing that the "stringent new remedies," including § 5, were "an uncommon exercise of congressional power," we nevertheless sustained the Act as a "permissibly decisive" response to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, *supra*, at 334–335 (footnote omitted).

It is also clear that under § 5, new or revised reapportionment plans are among those voting procedures, standards, or practices that may not be adopted by a covered State without the Attorney General's or a three-judge court's ruling that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." In *Allen* v. *State Board of Elections*, on which the Court of Appeals relied below, we held that a change from district to at-large voting for county supervisors had to be submitted for federal approval under § 5, because of the potential for a "dilution" of minority

voting power which could "nullify [its] ability to elect the candidate of [its] choice . . . ." 393 U. S., at 569. When it renewed the Voting Rights Act in 1970 and again in 1975, Congress was well aware of the application of § 5 to redistricting. In its 1970 extension, Congress relied on findings by the United States Commission on Civil Rights that the newly gained voting strength of minorities was in danger of being diluted by redistricting plans that divided minority communities among predominantly white districts.[17] In 1975, Congress was unmistakably cognizant of this new phase in the effort to eliminate voting discrimination. Former Attorney General Katzenbach testified that § 5 "has had its broadest impact . . . in the areas of redistricting and reapportionment," and the Senate and House reports recommending the extension of the Act referred specifically to the Attorney General's role in screening redistricting plans to protect

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[17] The findings of the Commission's 18-month study, contained in its 1968 report, Political Participation 21–39, were endorsed in a statement submitted in the course of the Senate debates by 10 out of 17 Senate Judiciary Committee members, who proposed and successfully supported the critical amendment that extended § 5. The findings were repeatedly referred to during the Senate and House hearings held in 1969 and 1970 in connection with the extension. *E. g.*, Hearings on H. R. 4249, H. R. 5538, and Similar Proposals (Voting Rights Act Extension) before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 3–4 (1969) (statement of Rep. McCulloch); *id.*, at 17 (testimony of Howard Glickstein, Acting Staff Director, United States Commission on Civil Rights); *id.*, at 150 (testimony of Thomas E. Harris, Associate General Counsel, AFL–CIO); Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 (Amendments to the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 47 (1970) (testimony of Frankie Freeman, member, United States Commission on Civil Rights); *id.*, at 132 (testimony of Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); *id.*, at 427 (statement of Howard Glickstein); *id.*, at 516–518 (testimony of David Norman, Deputy Assistant Attorney General, Civil Rights Division, U. S. Dept. of Justice).

the opportunities for nonwhites to be elected to public office.[18]

As the Court of Appeals understood the Act and our decision in *Allen*, compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines. That the Court of Appeals correctly read the Act has become clearer from later cases.

In *Beer* v. *United States*, 425 U. S. 130 (1976), the Court considered the question of what criteria a legislative reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the "effect" of denying or abridging the right to vote on account of race. *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U. S., at 141. This test was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. See *ibid.* But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented.

The reapportionment at issue in *Beer* was approved by this Court, because New Orleans had created one councilmanic district with a majority of black voters where none existed before. But had there been districts with black majorities under the previous law and had New Orleans in fact decreased the number of majority black districts, it would have had to modify its plan in order to implement its reapportionment by carving out a large enough black majority in however

[18] Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 124 (1975) (testimony of Nicholas Katzenbach); S. Rep. No. 94-295, pp. 15–19 (1975); H. R. Rep. No. 94-196, pp. 8–11 (1975).

many additional districts would be necessary to satisfy the *Beer* test. There was division on the Court as to what a State must show to satisfy § 5; but all eight Justices who participated in the decision implicitly accepted the proposition that a State may revise its reapportionment plan to comply with § 5 by increasing the percentage of black voters in a particular district until it has produced a clear majority. See 425 U. S., at 141–142; *id.*, at 144 (WHITE, J., dissenting); *id.*, at 158–161 (MARSHALL, J., dissenting). Indeed, the plan eventually approved by this Court in *Beer* was drawn with the purpose of avoiding dilution of the black vote by attaining at least a 54% majority of black voters in one district while preventing a 90% concentration. See App. in *Beer* v. *United States*, O. T. 1975, No. 73–1869, pp. 341–342.

The Court has taken a similar approach in applying § 5 to the extension of city boundaries through annexation. Where the annexation has the effect of reducing the percentage of blacks in the city, the proscribed "effect" on voting rights can be avoided by a post-annexation districting plan which "fairly reflects the strength of the Negro community as it exists after the annexation" and which "would afford [it] representation reasonably equivalent to [its] political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U. S. 358, 370–371 (1975). Accord, *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973). In *City of Richmond*, the Court approved an annexation which reduced the proportion of blacks in the city from 52% to 42%, because the post-annexation ward system created four out of nine wards with substantial black majorities of 64%. Had the redistricting failed to "fairly [reflect] the strength of the Negro community," however, it would follow from the Court's decision that the Constitution would permit the city to modify its plan by deliberately creating black majorities in a sufficient number of wards to satisfy statutory requirements.

Implicit in *Beer* and *City of Richmond*, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5 and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional. Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.[19]

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[19] Petitioners also insist that, because the Attorney General concluded not that the 1972 plan would have a discriminatory effect but only that the State had failed to demonstrate that the plan would not have such an effect, there was insufficient justification for racial redistricting. This argument overlooks the central role of the shift in burden of proof in the congressional effort to combat discriminatory voting laws. Our cases have upheld this shift. As we said in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 328 (1966): "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." And in affirming the issuance of an injunction against enforcement of a state reapportionment plan for which the State had not demonstrated the absence of a discriminatory effect, the Court stated:

"It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof. What the Attorney General's regulations do is to place the same burden on the submitting party in a § 5 objection procedure. . . . Any less stringent standard

Moreover, in the process of drawing black majority districts in order to comply with § 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. The figure used in drawing the *Beer* plan, for example, was 54% of registered voters.[20] At a minimum and by definition, a "black majority district" must be more than 50% black. But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the election of a black representative and to obtain approval of its reapportionment plan. Unless we adopted an unconstitutional construction of § 5 in *Beer* and *City of Richmond*, a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. Our cases under § 5 stand for at least this much.

III

Having rejected these three broad objections to the use of racial criteria in redistricting under the Voting Rights Act, we turn to the fourth question, which is whether the racial criteria New York used in this case—the revision of the 1972 plan to create 65% nonwhite majorities in two additional senate and two additional assembly districts—were constitutionally infirm. We hold they are not, on two separate grounds. The first is addressed in this Part III, the second in Part IV.

The first ground is that petitioners have not shown, or offered to prove, that New York did more than the Attorney General was authorized to require it to do under the non-

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might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, 411 U. S. 526, 538 (1973). (Footnote omitted.)

[20] See *supra*, at 160.

retrogression principle of *Beer*, a principle that, as we have already indicated, this Court has accepted as constitutionally valid. Under *Beer*, the acceptability of New York's 1972 reapportionment for purposes of § 5 depends on the change in nonwhite voting strength in comparison with the previous apportionment, which occurred in 1966. Yet there is no evidence in the record to show whether the 1972 plan increased or decreased the number of senate or assembly districts with substantial nonwhite majorities of 65%. For all that petitioners have alleged or proved, the 1974 revisions may have accomplished nothing more than the restoration of nonwhite voting strength to 1966 levels.[21] To be successful in their constitutional challenge to the racial criteria used in New York's revised plan, petitioners must show at a minimum that minority voting strength was increased under the 1974 plan in comparison with the 1966 apportionment; otherwise the challenge amounts to a constitutional attack on compliance with the statutory rule of nonretrogression.

In the absence of any evidence regarding nonwhite voting strength under the 1966 apportionment, the creation of substantial nonwhite majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength. The percentage of districts with nonwhite majorities was less than the percentage of nonwhites in the county as a whole (35%). The size of the nonwhite majorities in those districts reflected the need to take account of the substantial difference between the nonwhite

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[21] It is true, of course, that *Beer* was decided after petitioners moved for summary judgment in the District Court and after the Court of Appeals affirmed the District Court's denial of that motion and dismissal of the action. But while relying on *Beer* in this Court, petitioners take the position that there are no disputed issues of fact and that their motion for summary judgment should be granted on the basis of the present record. Reply Brief for Petitioners 13–14, 17 (filed Sept. 30, 1976); Tr. of Oral Arg. 70–71.

percentage of the total population in a district and the nonwhite percentage of the voting-age population.[22] Because, as the Court said in *Beer*, the inquiry under § 5 focuses ultimately on "the position of racial minorities with respect to their effective exercise of the electoral franchise," 425 U. S., at 141, the percentage of eligible voters by district is of great importance to that inquiry.[23] In the redistricting plan approved in *Beer*, for example, only one of the two districts with a black population majority also had a black majority of registered voters. *Id.*, at 142. We think it was reasonable for the Attorney General to conclude in this case that a *substantial* nonwhite population majority—in the vicinity of 65%—would be required to achieve a nonwhite majority of eligible voters.

Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of § 5. New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its primary defense of the plan, which was sustained on that

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[22] The NAACP, intervenor in this action, submitted census data to the Attorney General showing that roughly 75% of all whites in Kings County but only about 55% of all nonwhites were eligible to vote. App. 263. The NAACP urged that districts without significant nonwhite population majorities would not have nonwhite majorities among eligible voters. See, *e. g.*, *id.*, at 219.

The statistical problems in estimating the nonwhite population of the districts in the 1972 plan provided an additional reason for the Attorney General to ask for an increase in the size of the nonwhite majorities in certain districts. The legislature used the higher of the two sets of estimates, and the actual nonwhite population may have been somewhat lower. See *id.*, at 265.

[23] The regulation governing submissions to the Attorney General for review of redistricting plans under § 5 "strongly urges" the submitting authority to include "[v]oting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change." 28 CFR § 51.10 (b)(6)(ii) (1976).

basis by the Court of Appeals. Because the Court of Appeals was essentially correct, its judgment may be affirmed without addressing the additional argument by New York and by the United States that, wholly aside from New York's obligation under the Voting Rights Act to preserve minority voting strength in Kings County, the Constitution permits it to draw district lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county.

IV

This additional argument, however, affords a second, and independent, ground for sustaining the particulars of the 1974 plan for Kings County. Whether or not the plan was authorized by or was in compliance with § 5 of the Voting Rights Act, New York was free to do what it did as long as it did not violate the Constitution, particularly the Fourteenth and Fifteenth Amendments; and we are convinced that neither Amendment was infringed.

There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength. Compare *White* v. *Regester*, 412 U. S., at 765–767, and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), with *Gaffney* v. *Cummings*, 412 U. S. 735, 751–754 (1973). Petitioners have not objected to the

impact of the 1974 plan on the representation of white voters in the county or in the State as a whole. As the Court of Appeals observed, the plan left white majorities in approximately 70% of the assembly and senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population.

In individual districts where nonwhite majorities were increased to approximately 65%, it became more likely, given racial bloc voting, that black candidates would be elected instead of their white opponents, and it became less likely that white voters would be represented by a member of their own race; but as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race.[24] Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote. Some candidate, along with his supporters, always loses. See *Whitcomb* v. *Chavis*, 403 U. S., at 153–160.

Where it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the

[24] We also note that the white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county. See Note, 25 Stan. L. Rev. 84, 87 (1972). Of course, if voting does not follow racial lines, the white voter has little reason to complain that the percentage of nonwhites in his district has been increased.

race that is in the minority in that district. However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process. Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line.

It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls. In *Gaffney* v. *Cummings*, the Court upheld a districting plan "drawn with the conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U. S., at 752. We there recognized that districting plans would be vulnerable under our cases if "*racial or political groups* have been fenced out of the political process and their voting strength invidiously minimized," *id.*, at 754 (emphasis added); but that was not the case there, and no such purpose or effect may be ascribed to New York's 1974 plan. Rather, that plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County.

In this respect New York's revision of certain district lines is little different in kind from the decision by a State in which a racial minority is unable to elect representatives from multimember districts to change to single-member districting for the purpose of increasing minority representation. This change might substantially increase minority representation at the expense of white voters, who previously elected all of the legislators but who with single-member districts could elect no more than their proportional share. If

this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

As the Court said in *Gaffney:*

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Ibid.*

New York was well within this rule when, under the circumstances present in Kings County, it amended its 1972 plan.[25]

The judgment is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, concurring in part.

I join Parts I, II, and III of Mr. JUSTICE WHITE'S opinion. Part II effectively demonstrates that prior cases firmly estab-

[25] Petitioners seek to distinguish *Gaffney* on the ground that New York's use of racial criteria was not the product of "reasoned choice" by the state legislature but rather was coerced by federal officials. But we do not think that this otherwise constitutionally permissible plan was rendered unconstitutional merely because New York adopted it to comply with a federal statute.

lish the Attorney General's expansive authority to oversee legislative redistricting under § 5 of the Voting Rights Act. See, *e. g., Georgia* v. *United States,* 411 U. S. 526, 532 (1973); *Allen* v. *State Board of Elections,* 393 U. S. 544, 566, 569 (1969). Part III establishes to my satisfaction that as a method of securing compliance with the Voting Rights Act, the 65% rule applied to Brooklyn in this instance was not arbitrarily or casually selected. Yet, because this case carries us further down the road of race-centered remedial devices than we have heretofore traveled—with the serious questions of fairness that attend such matters—I offer this further explanation of my position.

The one starkly clear fact of this case is that an overt racial number was employed to effect petitioners' assignment to voting districts. In brief, following the Attorney General's refusal to certify the 1972 reapportionment under his § 5 powers, unnamed Justice Department officials made known that satisfaction of the Voting Rights Act in Brooklyn would necessitate creation by the state legislature of 10 state assembly and senate districts with threshold nonwhite populations of 65%. Prompted by the necessity of preventing interference with the upcoming 1974 election, state officials complied. Thus, the Justice Department's unofficial instruction to state officials effectively resulted in an explicit process of assignment to voting districts pursuant to race. The result of this process was a countywide pattern of districting closely approximating proportional representation. While it is true that this demographic outcome did not "underrepresent the white population" throughout the county, *ante,* at 154—indeed, the very definition of proportional representation precludes either underrepresentation or overrepresentation—these particular petitioners filed suit to complain that *they* have been subjected to a process of classification on the basis of race that adversely altered *their* status.

If we were presented here with a classification of voters

motivated by racial animus, *City of Richmond* v. *United States*, 422 U. S. 358, 378 (1975); *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (1964); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960), or with a classification that effectively downgraded minority participation in the franchise, *Georgia* v. *United States*, *supra*, at 534; *Whitcomb* v. *Chavis*, 403 U. S. 124, 144 (1971), we promptly would characterize the resort to race as "suspect" and prohibit its use. Under such circumstances, the tainted apportionment process would not necessarily be saved by its proportional outcome, for the segregation of voters into "separate but equal" blocs still might well have the intent or effect of diluting the voting power of minority voters. See, *e. g.*, *City of Richmond* v. *United States*, *supra*, at 378; *Wright* v. *Rockefeller*, *supra*, at 53–54; *infra*, at 172–173. It follows, therefore, that if the racial redistricting involved here, imposed with the avowed intention of clustering together 10 viable nonwhite majorities at the expense of preexisting white groupings, is not similarly to be prohibited, the distinctiveness that avoids this prohibition must arise from either or both of two considerations: the permissibility of affording preferential treatment to disadvantaged nonwhites generally, or the particularized application of the Voting Rights Act in this instance.

The first and broader of the two plausible distinctions rests upon the general propriety of so-called benign discrimination: The challenged race assignment may be permissible because it is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group. Even in the absence of the Voting Rights Act, this preferential policy plausibly could find expression in a state decision to overcome nonwhite disadvantages in voter registration or turnout through redefinition of electoral districts—perhaps, as here, through the application of a numerical rule—in order to achieve a

proportional distribution of voting power. Such a decision, in my view, raises particularly sensitive issues of doctrine and policy. Unlike Part IV of MR. JUSTICE WHITE's opinion,[1] I am wholly content to leave this thorny question until another day, for I am convinced that the existence of the Voting Rights Act makes such a decision unnecessary and alone suffices to support an affirmance of the judgment before us.

I begin with the settled principle that not every remedial use of race is forbidden. For example, we have authorized and even required race-conscious remedies in a variety of corrective settings. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 25 (1971); *United States* v. *Montgomery County Bd. of Education*, 395 U. S. 225 (1969); *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 772–774 (1976); *ante*, at 160. Once it is established that circumstances exist where race may be taken into account in

[1] Part IV limits its endorsement of proportional distribution of voting power to instances where the voters are polarized along racial lines and where the State intends "no racial slur or stigma with respect to" any race. *Ante*, at 165. I agree that, without such qualifications, the position taken in Part IV plainly would be intolerable. Yet, even as so limited, problems remain that, in my view, merit further consideration. For example, questions concerning the polarization of voters and the motives of the state policymakers may place formidable factfinding responsibilities on the courts. Such responsibilities, I believe, are greatly lessened when the Voting Rights Act is involved. See *infra*, at 175. Furthermore, I am not at rest with the notion that a "cognizable discrimination" cannot be found so long as whites "as a group [are] provided with fair representation . . . ." *Ante*, at 166. While voting may differ from other activities or entitlements in that one group of voters often derives benefits indirectly from a legislator serving a different constituency—and to that extent I agree that the adverse effects of a racial division are "mitigated," compare *ante*, at 166 n. 24 with *infra*, at 178—I am not satisfied that this vicarious benefit fully answers the Hasidim's complaint of injustice. Finally, I have serious doubts that the Court's acceptance of political-party apportionment in *Gaffney* v. *Cummings*, 412 U. S. 735, 751–754 (1973), necessarily applies to apportionment by race. Political affiliation is the keystone of the political trade. Race, ideally, is not.

fashioning affirmative policies,[2] we must identify those circumstances, and, further, determine how substantial a reliance may be placed upon race. If resort to the 65% rule involved here is not to be sanctioned, that must be because the benign use of such a binding numerical criterion (under the Voting Rights Act) generates problems of constitutional dimension that are not relevant to other, previously tolerated race-conscious remedies. As a focus for consideration of what these problems might or might not be, it is instructive to consider some of the objections frequently raised to the use of overt preferential race-assignment practices.

First, a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. Accordingly, courts might face considerable difficulty in ascertaining whether a given race classification truly furthers benign rather than illicit objectives. An effort to achieve proportional representation, for example, might be aimed at aiding a group's participation in the political processes by guaranteeing safe political offices, or, on the other hand, might be a "contrivance to segregate" the group, *Wright* v. *Rockefeller*, *supra*, at 58, thereby frustrating its potentially successful efforts at coalition building across

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[2] Of course, it could be suggested that the remedial rules upheld in these earlier cases acquired added legitimacy because they generally arose in the form of judicial decrees rather than affirmative legislative or executive action. Arguably, a court-imposed remedy to correct a ripe finding of discrimination should be accorded particular respect. Yet, the role of the judiciary is not decisive. First, as is the case here, even a legislative policy of remedial action can be closely tied to prior discriminatory practices or patterns. See *infra*, at 177–178. Second, many of the criticisms discussed below that commonly are leveled against the benign use of racial remedies—*e. g.*, the potential for arousing race consciousness and the likelihood of imposing disproportionate burdens of compliance upon relatively "innocent" whites—remain relevant regardless of the decisionmaker who imposes the remedial regime. I believe, therefore, that the history of equitable decrees utilizing racial criteria fairly establishes the broad principle that race may play a legitimate role in remedial policies.

racial lines. Compare, *e. g.*, the positions of the black plaintiffs in *Wright, supra,* at 53–54, with the black intervenors, 376 U. S., at 62 (Douglas, J., dissenting). Indeed, even the present case is not entirely free of complaints that the remedial redistricting in Brooklyn is not truly benign. Puerto Rican groups, for example, who have been joined with black groups to establish the "nonwhite" category, protested to the Attorney General that their political strength under the 1974 reapportionment actually is weaker than under the invalidated 1972 districting. App. 295. A black group similarly complained of the loss of a "safe" seat because of the inadequacy of the 65% target figure. *Id.,* at 296–297. These particular objections, as the Attorney General argued in his memorandum endorsing the 1974 reapportionment, may be ill-advised and unpersuasive. Nevertheless, they illustrate the risk that what is presented as an instance of benign race assignment in fact may prove to be otherwise. This concern, of course, does not undercut the theoretical legitimacy or usefulness of preferential policies. At the minimum, however, it does suggest the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb. And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line.

Second, even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. See, *e. g.*, Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U. L. Rev. 363, 379–380 (1966). Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct sys-

temic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection.[3] Again, these matters would not necessarily speak against the wisdom or permissibility of selective, benign racial classifications. But they demonstrate that the considerations that historically led us to treat race as a constitutionally "suspect" method of classifying individuals are not entirely vitiated in a preferential context.

Third, especially when interpreting the broad principles embraced by the Equal Protection Clause, we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination. See, *e. g.*, Kaplan, *supra*, at 373–374; cf. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 737–738 (1974). Perhaps not surprisingly, there are indications that this case affords an example of just such decisionmaking in operation. For example, the respondent-intervenors take pains to emphasize that the mandated 65% rule could have been attained through redistricting strategies that did not slice the Hasidic community in half. State authorities, however, chose to localize the burdens of race reassignment upon the petitioners rather than to redistribute a more varied and diffused range of

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[3] This phenomenon seems to have arisen with respect to policies affording preferential treatment to women: thus groups dedicated to advancing the legal position of women have appeared before this Court to challenge statutes that facially offer advantages to women and not men. See, *e. g.*, *Kahn* v. *Shevin*, 416 U. S. 351 (1974). This strategy, one surmises, can be explained on the basis that even good-faith policies favoring women may serve to highlight stereotypes concerning their supposed dependency and helplessness.

whites into predominatly nonwhite districts. Brief for Respondent-Intervenors 29–31. I am in no position to determine the accuracy of this appraisal, but the impression of unfairness is magnified when a coherent group like the Hasidim disproportionately bears the adverse consequences of a race-assignment policy.

In my view, if and when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act. However the Court ultimately decides the constitutional legitimacy of "reverse discrimination" pure and simple, I am convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.

The participation of the Attorney General, for example, largely relieves the judiciary of the need to grapple with the difficulties of distinguishing benign from malign discrimination. Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters, and accompanying implementing regulations ensure the availability of materials and submissions necessary to discern the true effect of a proposed reapportionment plan. See 28 CFR § 51.19 (1976). This initial right of review, coupled with the factfinding competence of the Justice Department, substantially reduces the likelihood that a complicated reapportionment plan that silently furthers malign racial policies would escape detection by appropriate officials. As a practical matter, therefore, I am prepared to accord considerable deference to the judgment of the Attorney General that a particular districting scheme complies with the remedial objectives furthered by the Voting Rights Act.

Similarly, the history of the Voting Rights Act provides reassurance that, in the face of the potential for reinvigorating racial partisanship, the congressional decision to authorize the use of race-oriented remedies in this context was the product of substantial and careful deliberations. Enacted following "voluminous legislative" consideration, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966), the Voting Rights Act represents an unequivocal and well-defined congressional consensus on the national need for "sterner and more elaborate measures," *ibid.*, to secure the promise of the Fourteenth and Fifteenth Amendments with respect to exercise of the franchise. Insofar as the drawing of district lines is a process that intrinsically involves numerical calculations, and insofar as state officials charged with the task of defining electoral constituencies are unlikely simply to close their eyes to considerations such as race and national origin,[4] the resort to a numerical racial criterion as a method of achieving compliance with the aims of the Voting Rights Act is, in my view, consistent with that consensus. Whatever may be the indirect and undesirable counter-educational costs of employing such far-reaching racial devices, Congress had to confront these considerations before opting for an activist race-conscious remedial role supervised by federal officials. The "insidious and pervasive" evil of

[4] It would be naive to suppose that racial considerations do not enter into apportionment decisions. A variety of motivations could produce such a reliance upon race: *e. g.*, the desire to injure a race, a conscious decision to distribute voting power among a variety of well-defined racial and ethnic groups or neighborhoods, or an attempt to employ race as a proxy for political affiliation. Cf. *Gaffney* v. *Cummings*, 412 U. S., at 753–754. The relative difficulty of isolating these motivations in this closeted decisionmaking context, and the further difficulty of deciding which of these motives should be permissible given the realities of the apportionment process, undoubtedly explain § 5's prohibition of practices that either "have the purpose . . . [or] effect of denying or abridging the right to vote on account of race or color . . . ."

voting rights violations, 383 U. S., at 309, and the "specially informed legislative competence" in this area, *Katzenbach* v. *Morgan*, 384 U. S. 641, 656 (1966); cf. *Morton* v. *Mancari*, 417 U. S. 535, 555 (1974), argue in support of the legitimacy of the federal decision to permit a broad range of race-conscious remedial techniques, including, as here, outright assignment by race.

This leaves, of course, the objection expressed by a variety of participants in this litigation: that this reapportionment worked the injustice of localizing the direct burdens of racial assignment upon a morally undifferentiated group of whites,[5] and, indeed, a group that plausibly is peculiarly vulnerable to such injustice. This argument has both normative and emotional appeal, but for a variety of reasons I am convinced that the Voting Rights Act drains it of vitality.

First, it is important to recall that the Attorney General's oversight focuses upon jurisdictions whose prior practices exhibited the purpose or effect of infringing the right to vote on account of race, thereby triggering § 4 of the Act, 42 U. S. C. § 1973b (1970 ed. and Supp. V). This direct nexus to localities with a history of discriminatory practices or effects enhances the legitimacy of the Attorney General's remedial authority[6]

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[5] I find nothing in the record to suggest—and such a proposition seems implausible—that the Hasidim bear any unique responsibility for the decisions that led to discriminatory voting practices or effects in Brooklyn. Nor is there any contention that petitioners derived special benefits from the prior discriminatory policies, other than to the extent that the overall white voice countywide was strengthened.

[6] It is true that invoking the Attorney General's jurisdiction under the Voting Rights Act does not require an actual finding of purposeful discrimination. Nonetheless, as MR. JUSTICE WHITE's opinion notes, Congress enacted the Act with "broadly remedial" objectives in mind, *ante*, at 156, and the conditions that activate § 4 are those "which experience had proved were indicative of racial discrimination in voting," *ante*, at 156–157. Indeed, these discriminatory effects often would afford probative evidence

over individuals within those communities who benefited (as whites) from those earlier discriminatory voting patterns. Moreover, the obvious remedial nature of the Act and its enactment by an elected Congress that hardly can be viewed as dominated by nonwhite representatives belie the possibility that the decisionmaker intended a racial insult or injury to those whites who are adversely affected by the operation of the Act's provisions.[7] Finally, petitioners have not been deprived of their right to vote, a consideration that minimizes the detrimental impact of the remedial racial policies governing the § 5 reapportionment. True, petitioners are denied the opportunity to vote as a group in accordance with the earlier districting configuration, but they do not press any legal claim to a group voice as Hasidim. Brief for Petitioners 6 n. 6. In terms of their voting interests, then, the burden that they claim to suffer must be attributable solely to their relegation to increased nonwhite-dominated districts. Yet, to the extent that white and nonwhite interests and sentiments are polarized in Brooklyn, the petitioners still are indirectly "protected" by the remaining white assembly and senate districts within the county, carefully preserved in accordance with the white proportion of the total county population. While these considerations obviously do not satisfy petitioners, I am persuaded that they reinforce the legitimacy of this remedy.

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of purposeful discrimination. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265–268 (1977).

[7] In this regard, it is important that, notwithstanding the worrisome implications of the intervenors, *supra*, at 174–175, petitioners themselves do not protest that their treatment under the 1974 plan was motivated by anti-Semitism. See, *e. g.*, Brest, The Supreme Court, 1975 Term, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 17 (1976). Indeed, it is undeniable that the Hasidic community is contiguous to several nonwhite neighborhoods, and, therefore, understandably is a candidate for redistricting given the goal of creating 10 viable nonwhite voting majorities.

Since I find nothing in the first three parts of Mr. JUSTICE WHITE's opinion that is inconsistent with the views expressed herein, I join those parts.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring in the judgment.

The question presented for decision in this case is whether New York's use of racial criteria in redistricting Kings County violated the Fourteenth or Fifteenth Amendment. The petitioners' contention is essentially that racial awareness in legislative reapportionment is unconstitutional *per se*. Acceptance of their position would mark an egregious departure from the way this Court has in the past analyzed the constitutionality of claimed discrimination in dealing with the elective franchise on the basis of race.

The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the Fifteenth Amendment. See *Gomillion* v. *Lightfoot*, 364 U. S. 339. They have made no showing that the redistricting scheme was employed as part of a "contrivance to segregate"; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process. See *Wright* v. *Rockefeller*, 376 U. S. 52, 58; *White* v. *Regester*, 412 U. S. 755; *Louisiana* v. *United States*, 380 U. S. 145; *Fortson* v. *Dorsey*, 379 U. S. 433.

Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washington* v. *Davis*, 426 U. S. 229. Disproportionate impact may afford some evidence that an invidious purpose was present. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266. But the record here does not support a finding that the redistricting plan undervalued the political power of white vot-

ers relative to their numbers in Kings County. Cf. *City of Richmond* v. *United States*, 422 U. S. 358. That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act—forecloses any finding that it acted with the invidious purpose of discriminating against white voters.*

Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek. Accordingly, I join the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

The question presented in this difficult case is whether New York violated the rights of the petitioners under the Fourteenth and Fifteenth Amendments by direct reliance on fixed racial percentages in its 1974 redistricting of Kings County. For purposes of analysis I will treat this in two steps: (1) Is the state legislative action constitutionally permissible absent any special considerations raised by the Fed-

*It is unnecessary to consider whether the position of the Department of Justice in this case was required or even authorized by the Voting Rights Act. It is enough to note that the Voting Rights Act and the procedures used to implement it are constitutionally valid, see, *e. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Allen* v. *State Board of Elections*, 393 U. S. 544; *Georgia* v. *United States*, 411 U. S. 526, and that the procedures followed in this case were consistent with the Act. Congress has established an exclusive forum—the District Court for the District of Columbia—and provided exclusive standing in the State or political subdivision to raise the issue of substantive compliance with the Act. 42 U. S. C. § 1973*l* (b) (1970 ed. and Supp. V). That procedure was not invoked by New York here, and the issue of statutory compliance is consequently not properly before us.

eral Voting Rights Act; and (2) does New York's obligation to comply with the Voting Rights Act permit it to use these means to achieve a federal statutory objective?

(1)

I begin with this Court's holding in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the first case to strike down a state attempt at racial gerrymandering. If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution. The record before us reveals—and it is not disputed—that this is precisely what took place here. In drawing up the 1974 reapportionment scheme, the New York Legislature did not consider racial composition as merely *one* of several political characteristics; on the contrary, race appears to have been the one and only criterion applied.

The principal opinion notes that after the 1972 apportionment plan was rejected, New York officials conferred with the Justice Department as to what plan could obtain the Attorney General's approval. One New York official testified that he "'got the feeling [from a Justice Department spokesman] . . . that 65 percent would be probably an approved figure.'" *Ante*, at 152. Further testimony by that same official is revealing:

> "Q: So that your reason for dividing the Ha[s]idic community was to effect compliance with the Department of Justice determination, and the minimum standards they impose—they appear to impose?
>
> "A: *That was the sole reason.* We spent over a full day right around the clock, attempting to come up with some other type of districting plan that would maintain the Ha[s]idic community as one entity, *and I think that is evidenced clearly by the fact that that district is exactly 65 percent, and it's because we went block by*

block, and didn't go higher or lower than that, in order to maintain as much of the community as possible." App. 112 (emphasis added).

This official also testified that apportionment solutions which would have kept the Hasidic community within a single district, but would have resulted in a 63.4% nonwhite concentration, were rejected for fear that, falling short of "exactly 65 percent," they "would not be acceptable" to the Justice Department. *Id.*, at 115.

The words "racial quota" are emotionally loaded and must be used with caution. Yet this undisputed testimony shows that the 65% figure was viewed by the legislative reapportionment committee as so firm a criterion that even a fractional deviation was deemed impermissible. I cannot see how this can be characterized otherwise than a strict quota approach and I must therefore view today's holding as casting doubt on the clear-cut principles established in *Gomillion.*

(2)

My second inquiry is whether the action of the State of New York becomes constitutionally permissible because it was taken to comply with the remedial provisions of the federal Voting Rights Act.

In *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966) the Court, while recognizing that the "stringent new remedies" were "an uncommon exercise of Congressional power" *id.*, at 334–335, upheld the Act as a "permissibly decisive" response to "the extraordinary stratagem of . . . perpetrating voting discrimination in the face of adverse federal court decrees." *Ibid.* In *Allen* v. *State Board of Elections,* 393 U. S. 544, 569 (1969), the Court sustained an application of § 5 to a change from a district to an at-large election of county supervisors because of a potential for "dilution" of minority voting power which could "nullify [the] ability to elect the candidate of [one's] choice." In *Allen* and *Katzenbach* the Court acknowledged

that the Voting Rights Act contemplated that the Attorney General and the affected state legislatures would be obliged to think in racial terms. In *Perkins* v. *Matthews*, 400 U. S. 379, 397 (1971) (concurring in judgment), and again in *Georgia* v. *United States*, 411 U. S. 526, 541 (1973) (dissenting opinion), I expressed doubt as to the correctness of *Allen* but acquiesced in the judgments on the basis of *stare decisis*.

The present case, however, presents a quite different situation. Faced with the straightforward obligation to redistrict so as to avoid "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U. S. 130, 141 (1976), the state legislature mechanically adhered to a plan designed to maintain—without tolerance for even a 1.6% deviation—a "nonwhite" population of 65% within several of the new districts. There is no indication whatever that use of this rigid figure was in any way related—much less necessary—to fulfilling the State's obligation under the Voting Rights Act as defined in *Beer*.

The plurality opinion acknowledges our recent *Beer* holding by noting that "there is no evidence in the record to show whether the 1972 plan increased or decreased the number of senate or assembly districts with substantial nonwhite majorities of 65%," and by speculating that "the 1974 revisions may have accomplished nothing more than the restoration of nonwhite voting strength to 1966 levels." *Ante*, at 163. It then proceeds to assume that the 1974 reapportionment was undertaken in compliance with *Beer*. The lack of evidence on this subject is, of course, not surprising, since petitioners' case was dismissed at the pleading stage. If this kind of racial redistricting is to be upheld, however, it should, at the very least, be done on the basis of record facts, not suppositions. If the Court seriously considers the issue in doubt, I should think that a remand for further factual determinations would be

the proper course of action.[1] On the present sparse record, however, I cannot find support in the Voting Rights Act for the arbitrary process followed by the New York Legislature.

The record is devoid of any evidence that the 65% figure was a reasoned response to the problem of past discrimination.[2] It is, rather, clear that under the time pressure of upcoming elections, and "in an atmosphere of hasty dickering," 510 F. 2d 512, 525, 526 (CA2 1975) (Frankel, J., dissenting), the New York Legislature simply accepted the standard formula from the Department of Justice and treated it as mandatory. Moreover, the formula appears to be based upon factually unsupportable assumptions. For example, it would make no sense to assure nonwhites a majority of 65% in a voting district

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[1] It is clear to me that Part III of the plurality opinion is singularly out of step with the rationale of *Beer* and may signal an erosion of that case decided only last Term. In explaining why, absent any facts, it is willing to assume that the 1974 reapportionment was undertaken in compliance with the Voting Rights Act as explicated in *Beer*, the opinion states:

"In the absence of any evidence regarding nonwhite voting strength under the 1966 apportionment, the creation of substantial nonwhite majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength. The percentage of districts with nonwhite majorities was less than the percentage of nonwhites in the county as a whole (35%)." *Ante*, at 163.

The rationale of *Beer*, of course, makes clear that the proportionality of nonwhite districts to the percentage of nonwhites in the county has absolutely no relation to the question of whether or not the Voting Rights Act was complied with. On the contrary, the proportionality rationale was embraced by MR. JUSTICE WHITE's dissent in that case, 425 U. S., at 143–144, and was rejected by the Court.

[2] It should be noted that the sole reason that New York, Bronx, and Kings Counties were brought under the sweep of the Voting Rights Act was that ballots in those counties had been prepared only in English and not in Spanish. In light of the large Puerto Rican population in those counties, this was held to be a "discriminatory test or device." See *Torres v. Sachs*, 381 F. Supp. 309 (SDNY 1974).

unless it were assumed that nonwhites and whites vote in racial blocs, and that the blocs vote adversely to, or independently of, one another. Not only is the record in this case devoid of any evidence that such bloc voting has taken or will take place in Kings County, but such evidence as there is points in the opposite direction: We are informed that four out of the five "safe" (65%+) nonwhite districts established by the 1974 plan have since elected white representatives. Brief for Respondent-Intervenors 48.

The assumption that "whites" and "nonwhites" in the county form homogeneous entities for voting purposes is entirely without foundation. The "whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the legislative interests of all "whites" are even substantially identical. In similar fashion, those described as "nonwhites" include, in addition to Negroes, a substantial portion of Puerto Ricans. Memorandum of Decision, U. S. Dept. of Justice Nos. V6541–47, July 1, 1974, p. 13 (App. 294).[3] The Puerto Rican population, for whose protection the Voting Rights Act was "triggered" in Kings County, see n. 2, *supra*, has expressly disavowed any identity of interest with the Negroes, and, in fact, objected to the 1974 redistricting scheme because it did not establish a Puerto Rican controlled district within the county.

(3)

Although reference to racial composition of a political unit may, under certain circumstances, serve as "a starting point in the process of shaping a remedy," *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 25 (1971), rigid adherence to quotas, especially in a case like this, deprives citizens such as petitioners of the opportunity to have the legislature make a determination free from unnecessary

[3] The Puerto Rican population constitutes 10.4% of the entire county population and one-third of the "nonwhite" population.

bias for or against any racial, ethnic, or religious group. I do not quarrel with the proposition that the New York Legislature may choose to take ethnic or community union into consideration in drawing its district lines. Indeed, petitioners are members of an ethnic community which, without deliberate purpose so far as shown on this record, has long been within a single assembly and senate district. While petitioners certainly have no constitutional right to remain unified within a single political district, they do have, in my view, the constitutional right not to be carved up so as to create a voting bloc composed of some other ethnic or racial group through the kind of racial gerrymandering the Court condemned in *Gomillion* v. *Lightfoot*.

If districts have been drawn in a racially biased manner in the past (which the record does not show to have been the case here) the proper remedy is to reapportion along neutral lines. Manipulating the racial composition of electoral districts to assure one minority or another its "deserved" representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process. "The vice lies . . . in . . . placing . . . the power of the State behind a racial classification that induces racial prejudice at the polls." *Anderson* v. *Martin*, 375 U. S. 399, 402 (1964).

The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter's interests, and that such candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York, and endorsed

by the Court today, moves us one step farther away from a truly homogeneous society. This retreat from the ideal of the American "melting pot" is curiously out of step with recent political history—and indeed with what the Court has said and done for more than a decade. The notion that Americans vote in firm blocs has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white. Since I cannot square the mechanical racial gerrymandering in this case with the mandate of the Constitution, I respectfully dissent from the affirmance of the judgment of the Court of Appeals.

MARKS ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-708. Argued November 1-2, 1976—Decided March 1, 1977

Petitioners were convicted of transporting obscene materials in violation of a federal statute. The conduct that gave rise to the charge occurred before *Miller* v. *California*, 413 U. S. 15, was decided, announcing new standards for "isolat[ing] 'hard core' pornography from expression protected by the First Amendment," *id.*, at 29. *Held:* The Due Process Clause of the Fifth Amendment precludes retroactive application to petitioners of the *Miller* standards, to the extent that those standards may impose criminal liability for conduct not punishable under the standards announced in *Memoirs* v. *Massachusetts*, 383 U. S. 413. *Bouie* v. *City of Columbia*, 378 U. S. 347. Specifically, petitioners are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value." At the same time, any constitutional principle announced in *Miller* that would serve to benefit petitioners must be applied in their case. *Hamling* v. *United States*, 418 U. S. 87, 102. Pp. 189-197.

520 F. 2d 913, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which STEWART and MARSHALL, JJ., joined, *post*, p. 197. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 198.

Robert Eugene Smith argued the cause for petitioners. With him on the brief were *Gilbert H. Deitch* and *Andrew Dennison.*

Solicitor General Bork argued the cause for the United States. With him on the brief were *Assistant Attorney General Thornburgh* and *Jerome M. Feit.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the

standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the Circuits.[1]

I

Petitioners were charged with several counts of transporting obscene materials in interstate commerce, in violation of 18 U. S. C. § 1465, and with conspiracy to transport such materials, 18 U. S. C. § 371. The conduct that gave rise to the charges covered a period through February 27, 1973.

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[1] Two Courts of Appeals have found instructions derived from *Miller* appropriate in prosecutions based on conduct occurring before the *Miller* decision came down: *United States* v. *Marks*, 520 F. 2d 913 (CA6 1975) (the instant case); and *United States* v. *Friedman*, 528 F. 2d 784 (CA10 1976), cert. pending, No. 75-1663. Three Courts of Appeals have reversed convictions where *Miller* instructions were given by the District Court: *United States* v. *Wasserman*, 504 F. 2d 1012 (CA5 1974); *United States* v. *Jacobs*, 513 F. 2d 564 (CA9 1974); *United States* v. *Sherpix, Inc.*, 168 U. S. App. D. C. 121, 512 F. 2d 1361 (1975).

In two earlier cases both conduct and trial occurred prior to *Miller*, and the jury instructions were derived from *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis*, 484 F. 2d 1149 (CA5 1973) (*Thevis I*), cert. denied, 418 U. S. 932 (1974); *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States*, held that *Miller* did not void all *Memoirs*-based convictions, but that on review appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See *Hamling*, 418 U. S., at 102. In later cases presenting similar facts, the Fifth Circuit has applied its holding in *Thevis I*. See, *e. g.*, *United States* v. *Linetsky*, 533 F. 2d 192 (1976); *United States* v. *Thevis*, 526 F. 2d 989 (1976) (*Thevis II*), cert. denied, 429 U. S. 928 (1976). See also *United States* v. *Hill*, 500 F. 2d 733 (CA5 1974), cert. denied, 420 U. S. 952 (1975). And the Ninth Circuit, following *Hamling*, has reached the same result. *United States* v. *Cutting*, 538 F. 2d 835 (1976) (en banc), cert. denied, 429 U. S. 1052 (1977).

Trial did not begin until the following October. In the interim, on June 21, 1973, this Court decided *Miller* v. *California, supra,* and its companion cases.[2] *Miller* announced new standards for "isolat[ing] 'hard core' pornography from expression protected by the First Amendment." 413 U. S., at 29.[3] That these new standards would also guide the future interpretation of the federal obscenity laws was clear from *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 129–130, and n. 7 (1973), decided the same day as *Miller.* See *Hamling* v. *United States, supra,* at 105, 113–114.

Petitioners argued in the District Court that they were entitled to jury instructions not under *Miller,* but under the more favorable formulation of *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) (plurality opinion).[4] *Memoirs,* in their

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[2] *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

[3] *Miller* held:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24.

Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.,* at 25.

[4] The plurality in *Memoirs* held that "three elements must coalesce" if material is to be found obscene and therefore outside the protection of the First Amendment:

"[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community stand-

view, authoritatively stated the law in effect prior to *Miller*, by which petitioners charted their course of conduct. They focused in particular on the third part of the *Memoirs* test. Under it, expressive material is constitutionally protected unless it is "utterly without redeeming social value." 383 U. S., at 418. Under *Miller* the comparable test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24. *Miller*, petitioners argue, casts a significantly wider net than *Memoirs*. To apply *Miller* retroactively, and thereby punish conduct innocent under *Memoirs*, violates the Due Process Clause of the Fifth Amendment—much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on *ex post facto* laws, Art. I, § 9, cl. 3; § 10, cl. 1. The District Court overruled these objections and instructed the jury under the *Miller* standards. Petitioners were convicted,[5] and a divided Court of Appeals for the Sixth Circuit affirmed.[6] 520 F. 2d 913 (1975). We now reverse.

II

The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, see *Calder* v. *Bull*, 3 Dall. 386 (1798), and does not of its own force apply to the Judicial Branch of government. *Frank* v. *Mangum*, 237 U. S. 309, 344 (1915). But the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. See *United States* v.

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ards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U. S., at 418.

[5] Petitioner American News Co., Inc., was convicted only on the conspiracy charge. The other four petitioners were convicted of conspiracy and also on seven of the eight substantive counts.

[6] Both in its brief and at oral argument in this Court the United States contended that petitioners' convictions under the *Miller* standards were

Harriss, 347 U. S. 612, 617 (1954); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.*, at 353–354.

Similarly, in *Rabe* v. *Washington*, 405 U. S. 313 (1972), we reversed a conviction under a state obscenity law because it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied.

Relying on *Bouie*, petitioners assert that *Miller* and its companion cases unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under *Memoirs*. The Court of Appeals rejected this argument. It noted—correctly—that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and it apparently concluded from this fact that *Memoirs* never became the law. By this line of reasoning, one must judge whether *Miller* expanded criminal liability by looking not to *Memoirs* but to *Roth* v. *United States*, 354

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improper, and consequently the Government does not defend the judgment of the Court of Appeals on this issue but agrees with petitioners that their convictions should not stand.

U. S. 476 (1957), the last comparable plenary decision of this Court prior to *Miller* in which a majority united in a single opinion announcing the rationale behind the Court's holding.[7] Although certain language in *Roth* formed the basis for the plurality's formulation in *Memoirs*, *Roth*'s test for distinguishing obscenity from protected speech was a fairly simple one to articulate: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489. If indeed *Roth*, not *Memoirs*, stated the applicable law prior to *Miller*, there would be much to commend the apparent view of the Court of Appeals that *Miller* did not significantly change the law.

But we think the basic premise for this line of reasoning is faulty. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg* v. *Georgia*, 428 U. S. 153, 169 n. 15 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas, concurred on broader grounds in reversing the judgment below. 383 U. S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. MR. JUSTICE STEWART also concurred in the judgment, based on his view that only "hard-core pornography" may be suppressed. *Id.*, at 421. See *Ginzburg* v. *United States*, 383 U. S. 463, 499 (1966)

[7] Shortly after *Memoirs*, in response to the divergence of opinion among Members of the Court, the Court began the practice of disposing of obscenity cases in brief *per curiam* decisions. *Redrup* v. *New York*, 386 U. S. 767 (1967), was the first. At least 31 cases were decided in this fashion. They are collected in *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 82–83, n. 8 (BRENNAN, J., dissenting).

(STEWART, J., dissenting). The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions.[8] Materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were "utterly without redeeming social value," and otherwise satisfied the stringent *Memoirs* requirements.

Memoirs therefore was the law. *Miller* did not simply clarify *Roth;* it marked a significant departure from *Memoirs.* And there can be little doubt that the third test announced in *Miller*—whether the work "lacks serious literary, artistic, political, or scientific value"—expanded criminal liability. The Court in *Miller* expressly observed that the "utterly without redeeming social value" test places on the prosecutor "a burden virtually impossible to discharge under our criminal standards of proof." 413 U. S., at 22. Clearly it was thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller.*

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[8] See, *e. g., Books, Inc.* v. *United States,* 358 F. 2d 935 (CA1 1966), rev'd *per curiam,* 388 U. S. 449 (1967); *United States* v. *35 Mm. Motion Picture Film,* 432 F. 2d 705 (CA2 1970), cert. dismissed *sub nom. United States* v. *Unicorn Enterprises, Inc.,* 403 U. S. 925 (1971); *United States* v. *Ten Erotic Paintings,* 432 F. 2d 420 (CA4 1970); *United States* v. *Groner,* 479 F. 2d 577 (CA5) (en banc) (the seven dissenting judges and one judge concurring in the result—constituting a majority on this issue—found that *Memoirs* stated the governing standard), vacated and remanded for further consideration in light of *Miller,* 414 U. S. 969 (1973); *United States* v. *Pellegrino,* 467 F. 2d 41 (CA9 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City,* 459 F. 2d 282 (CA10 1972); *Huffman* v. *United States,* 152 U. S. App. D. C 238, 470 F. 2d 386 (1971), conviction reversed on other grounds upon rehearing after *Miller,* 163 U. S. App. D. C. 417, 502 F. 2d 419 (1974). Cf. *Grove Press, Inc.* v. *City of Philadelphia,* 418 F. 2d 82 (CA3 1969); *Cinecom Theaters Midwest States, Inc.* v. *City of Fort Wayne,* 473 F. 2d 1297 (CA7 1973); *Luros* v. *United States,* 389 F. 2d 200 (CA8 1968).

This case is not strictly analogous to *Bouie*. The statutory language there was "narrow and precise," 378 U. S., at 352, and that fact was important to our holding that the expansive construction adopted by the State Supreme Court deprived the accused of fair warning. In contrast, the statute involved here always has used sweeping language to describe that which is forbidden.[9] But precisely because the statute is sweeping, its reach necessarily has been confined within the constitutional limits announced by this Court. *Memoirs* severely restricted its application. *Miller* also restricts its application beyond what the language might indicate, but *Miller* undeniably relaxes the *Memoirs* restrictions.[10] The effect is the same as the new construction in *Bouie*. Petitioners, engaged in the dicey business of marketing films subject to possible challenge, had no fair warning that their products might be subjected to the new standards.[11]

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[9] The statute provides in pertinent part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1465.

[10] For this reason, the instant case is different from *Rose* v. *Locke*, 423 U. S. 48 (1975), where the broad reading of the statute at issue did not upset a previously established narrower construction.

[11] In *Hamling* we rejected a challenge based on *Bouie* v. *City of Columbia*, ostensibly similar to the challenge that is sustained here. 418 U. S., at 115–116. But the similarity is superficial only. There the petitioners focused on part (b) of the *Miller* test. See n. 3, *supra*. They argued that their convictions could not stand because *Miller* requires that the categories of material punishable under the statute must be specifically enumerated in the statute or in authoritative judicial construction. No such limiting construction had been announced at the time they engaged in the conduct that led to their convictions. We held that this made out no claim under *Bouie*, for part (b) did not expand the reach of the statute. "[T]he enumeration of specific categories of material in *Miller*

We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 40–41 (1976); *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974). Section 1465 is such a statute. We therefore hold, in accordance with *Bouie*, that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller* v. *California*, to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*. Specifically, since the petitioners were indicted for conduct occurring prior to our decision in *Miller*, they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value." [12] At the same time we reaffirm our

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which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal." 418 U. S., at 116.

For the reasons noted in text, the same cannot be said of part (c) of the *Miller* test, shifting from "utterly without redeeming social value" to "lacks serious literary, artistic, political or scientific value." This was implicitly recognized by the Court in *Hamling* itself. There the trial took place before *Miller*, and the jury had been instructed in accordance with *Memoirs*. Its verdict necessarily meant that it found the materials to be utterly without redeeming social value. This Court examined the record and determined that the jury's verdict "was supported by the evidence and consistent with the *Memoirs* formulation of obscenity." 418 U. S., at 100. We did not avoid that inquiry on the ground that *Memoirs* had no relevance, as we might have done if *Miller* applied retroactively in all respects.

[12] The Court of Appeals stated, apparently without viewing the materials, 520 F. 2d, at 923 n. 1 (McCree, J., dissenting), that in its opinion the materials here were obscene under either *Memoirs* or *Miller*. 520 F. 2d, at 922. Such a conclusion, absent other dependable means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly

holding in *Hamling* v. *United States*, 418 U. S., at 102, that "any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case." [13]

Accordingly, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.[14]

So ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join the opinion of the Court insofar as it holds that the retroactive application of the definition of obscenity announced in *Miller* v. *California*, 413 U. S. 15 (1973), to the potential detriment of a criminal defendant, violates the Due Process Clause of the Fifth Amendment. See *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964).

I cannot join, however, in the judgment remanding the case for a new trial. Petitioners were convicted of transporting obscene materials in interstate commerce in violation of 18 U. S. C. § 1465. I adhere to the view that this statute is "'clearly overbroad and unconstitutional on its face.'" See, *e. g.*, *Cangiano* v. *United States*, 418 U. S. 934, 935 (1974) (BRENNAN, J., dissenting), quoting *United States* v. *Orito*, 413

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instructed jury, as to this important element of the offense under 18 U. S. C. § 1465.

[13] The Court of Appeals apparently thought that our remand in *Miller* and the companion cases necessarily meant that *Miller* standards were fully retroactive. 520 F. 2d, at 920. But the passage from *Hamling* quoted in the text, which simply reaffirms a principle implicit in *Miller*, makes it clear that the remands carried no such implication. Our 1973 cases were remanded for the courts below to apply the "benefits" of *Miller*. See n. 3, *supra*.

[14] In view of our disposition of the case, we have no occasion to reach the other questions presented in the petition.

U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would simply reverse.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

There are three reasons which, in combination, persuade me that this criminal prosecution is constitutionally impermissible. First, as the Court's opinion recognizes, this "statute regulates expression and implicates First Amendment values." *Ante*, at 196. However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace. Second, the statute is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess. See *Stanley* v. *Georgia*, 394 U. S. 557. Third, the present constitutional standards, both substantive and procedural,* which apply to these prosecutions are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility. Indeed, my brief experience on the Court has persuaded me that grossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law. Accordingly, while I agree with everything said in the Court's opinion, I am unable to join its judgment remanding the case for a new trial.

*How, for example, can an appellate court intelligently determine whether a jury has properly identified the relevant community standards?

Syllabus

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* GOLDFARB

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 75-699. Argued October 5, 1976—Decided March 2, 1977

Under the Social Security Act survivors' benefits based on the earnings of a deceased husband covered by the Act are payable to his widow regardless of dependency, but under 42 U. S. C. § 402 (f) (1) (D) such benefits on the basis of the earnings of a deceased wife covered by the Act are payable to her widower only if he was receiving at least half of his support from her. In a suit challenging these provisions, a three-judge District Court held that the different treatment of men and women mandated by § 402 (f) (1) (D) constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees. *Held:* The judgment is affirmed. Pp. 204–217; 217–224.

396 F. Supp. 308, affirmed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL, concluded that the gender-based distinction created by § 402 (f) (1) (D) violates the Due Process Clause of the Fifth Amendment. *Weinberger* v. *Wiesenfeld,* 420 U. S. 636; *Frontiero* v. *Richardson,* 411 U. S. 677. Pp. 204–217.

(a) Such distinction, which results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of male workers, is constitutionally forbidden at least when supported by no more substantial justification than "archaic and overbroad" generalizations or "old notions," such as "assumptions as to dependency," that are more consistent with "the role-typing society has long imposed" than with contemporary reality. Pp. 204–207.

(b) Equal protection analysis here cannot center solely on the distinction drawn between widowers and widows but must be focused as well on the gender-based discrimination against covered female wage earners. Pp. 207–209.

(c) The fact that a covered employee's interest in future social security benefits is "noncontractual" does not preclude any claim of

equal protection denial, but benefits "directly related to years worked and amount earned by a covered employee, and not to the needs of the beneficiaries directly . . . must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex," *Wiesenfeld, supra*, at 647. Pp. 210–212.

(d) It appears from § 402 (f) (1) (D)'s phrasing and legislative history as well as from the general scheme of the Old-Age, Survivors, and Disability Insurance benefits program, that the differential treatment of nondependent widows and widowers results, not from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent. The only justification for a classification based on this latter presumption is the unverified assumption that it would save the Government time, money, and effort simply to pay benefits to all widows rather than to require proof of dependency of both sexes, and such an assumption does not suffice to justify a gender-based discrimination in the distribution of employment-related benefits. Pp. 212–217.

MR. JUSTICE STEVENS concluded that the relevant discrimination is against surviving male spouses, rather than against deceased female wage earners, that such discrimination is merely the accidental byproduct of a traditional way of thinking about females, and that something more than accident is necessary to justify under the Fifth Amendment the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses. Pp. 217–224.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which WHITE, MARSHALL, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 217. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined, *post*, p. 224.

Deputy Solicitor General Jones argued the cause for appellant. With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Howard E. Shapiro,* and *William Kanter.*

Ruth Bader Ginsburg argued the cause for appellee. With her on the brief were *Melvin L. Wulf* and *Nadine Taub.*

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL joined.

Under the Federal Old-Age, Survivors, and Disability Insurance Benefits (OASDI) program, 42 U. S. C. §§ 401–431 (1970 ed. and Supp. V), survivors' benefits based on the earnings of a deceased husband covered by the Act are payable to his widow. Such benefits on the basis of the earnings of a deceased wife covered by the Act are payable to the widower, however, only if he "was receiving at least one-half of his support" from his deceased wife.[1] The question in this case is

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[1] Title 42 U. S. C. § 402 (f)(1) (1970 ed. and Supp. V), in pertinent part, provides:

"The widower . . . of an individual who died a fully insured individual, if such widower—

"(A) has not remarried,

. . . . . .

"(B)(i) has attained age 60, or (ii) has attained age 50 . . . and is under a disability . . . ,

"(C) has filed application for widower's insurance benefits . . . ,

"(D)(i) was receiving at least one-half of his support . . . from such individual at the time of her death, or if such individual had a period of disability which did not end prior to the month in which she died, at the time such period began or at the time of her death, and filed proof of such support within two years after the date of such death . . . , or (ii) was receiving at least one-half of his support . . . from such individual at the time she became entitled to old-age . . . insurance benefits . . . , and filed proof of such support within two years after the month in which she became entitled to such benefits . . . and,

"(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

"shall be entitled to a widower's insurance benefit . . . ."

Compare 42 U. S. C. § 402 (e)(1) (1970 ed. and Supp. V), which provides, in pertinent part:

"The widow . . . of an individual who died a fully insured individual, if such widow . . .

"(A) is not married,

whether this gender-based distinction violates the Due Process Clause of the Fifth Amendment.

A three-judge District Court for the Eastern District of New York held that the different treatment of men and women mandated by § 402 (f)(1)(D) constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees, 396 F. Supp. 308 (1975).[2] We noted probable jurisdiction. 424 U. S. 906 (1976). We affirm.

I

Mrs. Hannah Goldfarb worked as a secretary in the New York City public school system for almost 25 years until

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"(B)(i) has attained age 60, or (ii) has attained age 50 . . . and is under a disability . . . ,

"(C)(i) has filed application for widow's insurance benefits . . . and

"(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,

"shall be entitled to a widow's insurance benefit . . . ."

[2] The decision also applied to § 402 (c)(1)(C), which imposes a dependency requirement on husbands of covered female wage earners applying for old-age benefits; wives applying for such benefits are not required to prove dependency, § 402 (b). These gender-based classifications have been uniformly held to be unconstitutional. See *Abbott* v. *Weinberger*, Civ. No. C74–194 (ND Ohio, Feb. 12, 1976), appeal docketed *sub nom. Califano* v. *Abbott*, No. 75–1643 (husband's old-age benefits); *Coffin* v. *Secretary of Health, Education and Welfare*, 400 F. Supp. 953 (DC 1975) (three-judge court), appeal docketed *sub nom. Califano* v. *Coffin*, No. 75–791 (both husband's and widower's benefits); *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (Md. 1975) (three-judge court), appeal docketed *sub nom. Califano* v. *Jablon*, No. 75–739 (husband's benefits); *Silbowitz* v. *Secretary of Health, Education and Welfare*, 397 F. Supp. 862 (SD Fla. 1975) (three-judge court), appeal docketed *sub nom. Califano* v. *Silbowitz*, No. 75–712 (husband's benefits). See also *Kalina* v. *Railroad Retirement Bd.*, 541 F. 2d 1204 (CA6 1976) (spouse's annuity under the Railroad Retirement Act of 1974, 45 U. S. C. § 231a (c)(3)(ii) (1970 ed., Supp. V)).

her death in 1968. During that entire time she paid in full all social security taxes required by the Federal Insurance Contributions Act, 26 U. S. C. §§ 3101–3126. She was survived by her husband, Leon Goldfarb, now aged 72, a retired federal employee. Leon duly applied for widower's benefits. The application was denied with the explanation:

> "You do not qualify for a widower's benefit because you do not meet one of the requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she died." [3]

The District Court declared § 402 (f)(1)(D) unconstitutional primarily on the authority of *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), stating:

> "[Section 402 (f)(1)(D)] and its application to this plaintiff, 'deprive women of protection for their families which men receive as a result of their employment.' Weinberger v. Wiesenfeld, 420 U. S. 636, 645 . . . (1975). *See also* Frontiero v. Richardson, 411 U. S. 677 . . . (1973)
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> . . . . .
>
> "Whatever may have been the ratio of contribution to family expenses of the Goldfarbs while they both

[3] Although Mr. Goldfarb did not pursue an administrative appeal of the denial of his application, appellant concedes that because the denial was based on his failure to meet a clear statutory requirement, further administrative review would have been futile and the initial denial was therefore "final" for purposes of the District Court's jurisdiction to review it under 42 U. S. C. § 405 (g). See *Weinberger* v. *Salfi*, 422 U. S. 749, 764–767 (1975).

In order for Mr. Goldfarb to have satisfied § 402 (f)(1)(D), his wife would have to have been earning three times what he earned. According to Brief for Appellant 25: "As a practical matter, only husbands whose wives contribute 75 percent of the family income meet [the dependency] test." That is because in order to meet the test, the wife must have provided for all of her own half of the family budget, plus half of her husband's share. For more elaborate descriptions of the dependency cal-

worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple or one of them retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men." 396 F. Supp., at 308–309.

II

The gender-based distinction drawn by § 402 (f)(1)(D)—burdening a widower but not a widow with the task of proving dependency upon the deceased spouse—presents an equal protection question indistinguishable from that decided in *Weinberger* v. *Wiesenfeld, supra.* That decision and the decision in *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), plainly require affirmance of the judgment of the District Court.[4]

The statutes held unconstitutional in *Frontiero* provided increased quarters allowance and medical and dental benefits to a married male member of the uniformed Armed Services whether or not his wife in fact depended on him, while a married female service member could only

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culation, see 20 CFR § 404.350 (1976); Social Security Claims Manual, §§ 2625, 2628. See also Brief for Appellant 25–26, and n. 14; Brief for Appellee 5 n. 7.

[4] The dissent maintains that this sentence "overstates [the] relevance" of *Wiesenfeld* and *Frontiero.* It is sufficient to answer that the principal propositions argued by appellant and in the dissent—namely, the focus on discrimination between surviving, rather than insured, spouses; the reliance on *Kahn* v. *Shevin,* 416 U. S. 351 (1974); the argument that the presumption of female dependence is empirically supportable; and the emphasis on the special deference due to classifications in the Social Security Act—were all asserted and rejected in one or both of those cases as justifications for statutes substantially similar in effect to § 402 (f)(1)(D).

receive the increased benefits if she in fact provided over one-half of her husband's support. To justify the classification, the Secretary of Defense argued: "[A]s an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, . . . Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact." 411 U. S., at 688–689. But *Frontiero* concluded that, by according such differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statute violated the Fifth Amendment. See *Reed* v. *Reed*, 404 U. S. 71, 76 (1971); *Stanley* v. *Illinois*, 405 U. S. 645, 656–657 (1972); cf. *Schlesinger* v. *Ballard*, 419 U. S. 498, 506–507 (1975).

Weinberger v. *Wiesenfeld*, like the instant case, presented the question in the context of the OASDI program. There the Court held unconstitutional a provision that denied father's insurance benefits to surviving widowers with children in their care, while authorizing similar mother's benefits to similarly situated widows. Paula Wiesenfeld, the principal source of her family's support, and covered by the Act, died in childbirth, survived by the baby and her husband Stephen. Stephen applied for survivors' benefits for himself and his infant son. Benefits were allowed the baby under 42 U. S. C. § 402 (d) (1970 ed., Supp. III), but denied the father on the ground that "mother's benefits" under § 402 (g) were available only to women. The Court reversed, holding that the gender-based distinction made by § 402 (g) was "indistinguishable from that invalidated in *Frontiero*," 420 U. S., at 642, and therefore:

"[While] the notion that men are more likely than women

to be the primary supporters of their spouses and children is not entirely without empirical support, . . . such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

"Section 402 (g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero*, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. . . . [I]n this case social security taxes were deducted from Paula's salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Id.*, at 645.

Precisely the same reasoning condemns the gender-based distinction made by § 402 (f)(1)(D) in this case. For that distinction, too, operates "to deprive women of protection for their families which men receive as a result of their employment": social security taxes were deducted from Hannah Goldfarb's salary during the quarter century she worked as a secretary, yet, in consequence of § 402 (f)(1)(D), she also "not only failed to receive for her [spouse] the same protection which a similarly situated male worker would have received [for his spouse] but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Wiesenfeld* thus inescapably compels the conclusion reached by the District Court that the gender-based differentiation created by § 402 (f)(1)(D)—that results in the efforts of female workers required to pay social security taxes producing less pro-

tection for their spouses than is produced by the efforts of men—is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations, *Schlesinger* v. *Ballard, supra,* at 508, or "'old notions,'" *Stanton* v. *Stanton,* 421 U. S. 7, 14 (1975), such as "assumptions as to dependency," *Weinberger* v. *Wiesenfeld, supra,* at 645, that are more consistent with "the role-typing society has long imposed," *Stanton* v. *Stanton, supra,* at 15, than with contemporary reality. Thus § 402 (f)(1)(D) "'[b]y providing dissimilar treatment for men and women who are . . . similarly situated . . . violates the [Fifth Amendment].' *Reed* v. *Reed,* 404 U. S. 71, 77. . . ." *Weinberger* v. *Wiesenfeld, supra,* at 653.

III

Appellant, however, would focus equal protection analysis, not upon the discrimination against the covered wage earning female, but rather upon whether her surviving widower was unconstitutionally discriminated against by burdening him but not a surviving widow with proof of dependency. The gist of the argument is that, analyzed from the perspective of the widower, "the denial of benefits reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny them benefits unless they were in fact dependent." Brief for Appellant 12.

But *Weinberger* v. *Wiesenfeld* rejected the virtually identical argument when appellant's predecessor argued that the statutory classification there attacked should be regarded from the perspective of the prospective beneficiary and not from that of the covered wage earner. The Secretary in that case argued that the "pattern of legislation reflects the considered judgment of Congress that the 'probable need' for financial assistance is greater in the case of a widow, with young children to maintain, than in the case of similarly situ-

ated males." Brief for Appellant in No. 73–1892, O. T. 1974, p. 14. The Court, however, analyzed the classification from the perspective of the wage earner and concluded that the classification was unconstitutional because "benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." 420 U. S., at 647. Thus, contrary to appellant's insistence, Brief for Appellant 12, *Wiesenfeld* is "dispositive here."

From its inception, the social security system has been a program of social insurance. Covered employees and their employers pay taxes into a fund administered distinct from the general federal revenues to purchase protection against the economic consequences of old age, disability, and death. But under § 402 (f)(1)(D) female insureds received less protection for their spouses solely because of their sex. Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues, but because of § 402 (f)(1)(D) the insurance protection received by the males was broader than hers. Plainly then § 402 (f)(1)(D) disadvantages women contributors to the social security system as compared to similarly situated men.[5] The section then "impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." *Wiesenfeld, supra,* at 654–655 (POWELL, J., concur-

[5] The disadvantage to the woman wage earner is even more pronounced in the case of old-age benefits, to which a similarly unequal dependency requirement applies. 42 U. S. C. §§ 402 (b), (c)(1)(C) (1970 ed. and Supp. V). See n. 2, *supra.* In that situation, where the insured herself is still living, she is denied not only "the dignity of knowing [during her working career] that her social security tax would contribute to their joint welfare when the couple or one of them retired and to her husband's welfare should she predecease him," 396 F. Supp. 308, 309 (EDNY 1975) (opinion below), but also the more tangible benefit of an increase in the income of the family unit of which she remains a part.

ring). In a sense, of course, both the female wage earner and her surviving spouse are disadvantaged by operation of the statute, but this is because "Social Security is designed . . . for the protection of the *family*," 420 U. S., at 654 (POWELL, J., concurring),[6] and the section discriminates against one particular category of family—that in which the female spouse is a wage earner covered by social security.[7] Therefore decision of the equal protection challenge in this case cannot focus solely on the distinction drawn between widowers and widows but, as *Wiesenfeld* held, upon the gender-based discrimination against covered female wage earners as well.[8]

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[6] See, *e. g.*, H. R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939), accompanying the bill that extended social security benefits for the first time beyond the covered wage earner himself. The Report emphasizes that the purpose of the amendments was "to afford more adequate protection to the *family* as a unit." (Emphasis supplied.)

[7] This is accepted by appellant and appellee. See, *e. g.*, Brief for Appellant 13 n. 2; Brief for Appellee 23; Tr. of Oral Arg. 7.

[8] In any event, gender-based discriminations against men have been invalidated when they do not "serve important governmental objectives and [are not] substantially related to the achievement of those objectives." *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). Neither *Kahn* v. *Shevin*, 416 U. S. 351 (1974), nor *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), relied on by appellant, supports a contrary conclusion. The gender-based distinctions in the statutes involved in *Kahn* and *Ballard* were justified because the only discernible purpose of each was the permissible one of redressing our society's longstanding disparate treatment of women. *Craig* v. *Boren*, *supra*, at 198 n. 6.

But "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). That inquiry in this case demonstrates that § 402 (f) (1)(D) has no such remedial purpose. See Part IV–B, *infra*. Moreover, the classifications challenged in *Wiesenfeld* and in this case rather than advantaging women to compensate for past wrongs compounds those wrongs by penalizing women "who do work and whose earnings contribute significantly to their families' support." *Wiesenfeld*, *supra*, at 645.

IV

Appellant's emphasis upon the sex-based distinction between widow and widower as recipients of benefits rather than that between covered female and covered male employees also emerges in his other arguments. These arguments have no merit.

A

We accept as settled the proposition argued by appellant that Congress has wide latitude to create classifications that allocate noncontractual benefits under a social welfare program. *Weinberger* v. *Salfi*, 422 U. S. 749, 776–777 (1975); *Flemming* v. *Nestor*, 363 U. S. 603, 609–610 (1960). It is generally the case, as said, *id.*, at 611:

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

See also *Weinberger* v. *Salfi*, *supra*, at 768–770; *Richardson* v. *Belcher*, 404 U. S. 78, 81, 84 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 485–486 (1970).

But this "does not, of course, immunize [social welfare legislation] from scrutiny under the Fifth Amendment." *Richardson* v. *Belcher*, *supra*, at 81. The Social Security Act is permeated with provisions that draw lines in classifying those who are to receive benefits. Congressional decisions in this regard are entitled to deference as those of the institution charged under our scheme of government with the primary responsibility for making such judgments in light of competing policies and interests. But "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to

the achievement of those objectives." *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).[9] Such classifications, however, have frequently been revealed on analysis to rest only upon "old notions" and "archaic and overbroad" generalizations, *Stanton* v. *Stanton*, 421 U. S., at 14; *Schlesinger* v. *Ballard*, 419 U. S., at 508; cf. *Mathews* v. *Lucas*, 427 U. S. 495, 512–513 (1976), and so have been found to offend the prohibitions against denial of equal protection of the law. *Reed* v. *Reed*, 404 U. S. 71 (1971); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Stanton* v. *Stanton*, *supra*; *Craig* v. *Boren*, *supra*. See also *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Taylor* v. *Louisiana*, 419 U. S. 522 (1975).

Therefore, *Wiesenfeld*, *supra*, at 646–647, expressly rejected the argument of appellant's predecessor, relying on *Flemming* v. *Nestor*, that the "noncontractual" interest of a covered employee in future social security benefits precluded any claim of denial of equal protection. Rather, *Wiesenfeld* held that the fact that the interest is "noncontractual" does not mean that "a covered employee has

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[9] Thus, justifications that suffice for non-gender-based classifications in the social welfare area do not necessarily justify gender discriminations. For example, *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), sustained a discrimination designed to weed out collusive marriages without making case-by-case determinations between marriages of less than nine months' duration and longer ones on the ground:

"While such a limitation doubtless proves in particular cases to be 'underinclusive' or 'over-inclusive' in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms." *Id.*, at 776.

Yet administrative convenience and certainty of result have been found inadequate justifications for gender-based classifications. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971); *Frontiero* v. *Richardson*, 411 U. S. 677, 690 (1973); *Stanley* v. *Illinois*, 405 U. S. 645, 656–657 (1972) Cf. *Mathews* v. *Lucas*, 427 U. S. 495, 509–510 (1976).

no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment," nor does it "sanction differential protection for covered employees which is solely gender based." 420 U. S., at 646. On the contrary, benefits "directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly," like the employment-related benefits in *Frontiero*, "must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." 420 U. S., at 647.

B

Appellant next argues that *Frontiero* and *Wiesenfeld* should be distinguished as involving statutes with different objectives from § 402 (f)(1)(D). Rather than merely enacting presumptions designed to save the expense and trouble of determining which spouses are really dependent, providing benefits to all widows, but only to such widowers as prove dependency, § 402 (f)(1)(D), it is argued, rationally defines different standards of eligibility because of the differing social welfare needs of widowers and widows. That is, the argument runs, Congress may reasonably have presumed that nondependent widows, who receive benefits, are needier than nondependent widowers, who do not, because of job discrimination against women (particularly older women), see *Kahn* v. *Shevin*, 416 U. S. 351, 353–354 (1974), and because they are more likely to have been more dependent on their spouses. See *Wiesenfeld*, 420 U. S., at 645; *Kahn* v. *Shevin*, *supra*, at 354 n. 7.[10]

But "inquiry into the actual purposes" of the discrimina-

[10] This argument is made for the first time in appellant's brief. The Jurisdictional Statement, p. 11, argued only the rationality of "extending to women . . . the presumption of dependency."

tion, *Wiesenfeld, supra,* at 648, proves the contrary. First, § 402 (f)(1)(D) itself is phrased in terms of *dependency,* not *need.* Congress chose to award benefits, not to widowers who could prove that they are needy, but to those who could prove that they had been dependent on their wives for more than one-half of their support. On the face of the statute, dependency, not need, is the criterion for inclusion.

Moreover, the general scheme of OASDI shows that dependence on the covered wage earner is the critical factor in determining beneficiary categories.[11] OASDI is intended to insure covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income due to retirement, disability, or death, by providing benefits to replace the lost wages. Cf. *Jimenez* v. *Weinberger,* 417 U. S. 628, 633–634 (1974). Thus, benefits are not paid, as under other welfare programs, simply to categories of the population at large who need economic assistance, but only to members of the family of the insured wage earner.[12] Moreover, every family member other than a wife or widow is eligible for benefits only if a dependent of the covered wage earner.[13] This ac-

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[11] Although presumed need has been a factor in determining the amounts of social security benefits, in addition to the extent of contributions made to the system, the primary determinants of the benefits received are the years worked and amount earned by the covered worker. 42 U. S. C. §§ 414, 415 (1970 ed. and Supp. V). See *Weinberger* v. *Wiesenfeld,* 420 U. S., at 647, and nn. 14, 15. In any event, need is not a requirement for inclusion in any beneficiary category, 42 U. S. C. § 402 (1970 ed. and Supp. V), and from the beginning was intended to be irrelevant to the right to receive benefits. See H. R. Rep. No. 615, 74th Cong., 1st Sess., 1 (1935).

[12] Old-age or survivors' benefits may be paid to the insured wage earner himself, 42 U. S. C. § 402 (a) (1970 ed. and Supp. V); his spouse, while he is still alive, §§ 402 (b), (c), or after his death, §§ 402 (e), (f), (g); his children, § 402 (d); and his parents, § 402 (h).

[13] Dependency is a prerequisite to qualification for parents' benefits, § 402 (h)(1)(B); children's benefits, § 402 (d)(1)(C); husbands' benefits,

cords with the system's general purpose; one who was not dependent to some degree on the covered wage earner suffers no economic loss when the wage earner leaves the work force. Thus the overall statutory scheme makes actual dependency the general basis of eligibility for OASDI benefits, and the statute, in omitting that requirement for wives and widows, reflects only a presumption that they are ordinarily dependent. At all events, nothing whatever suggests a reasoned congressional judgment that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers.

Finally, the legislative history of § 402 (f)(1)(D) refutes appellant's contention. The old-age provisions of the original Social Security Act, 49 Stat. 622, provided pension benefits only to the wage earner himself, with a lump-sum payment to his estate under certain circumstances.[14] Wives' and widows' benefits were first provided when coverage was extended to other family members in 1939. Social Security Act Amendments of 1939, 53 Stat. 1360, 1364–1366. The general purpose of the amendments was "to afford more adequate protection to the *family* as a unit." H. R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939). (Emphasis supplied.) The House Ways and Means Committee criticized the old lump-sum payment because it "make[s] payments to the estate of a deceased person regardless of whether or not he leaves dependents." *Ibid.* The Social Security Board, which had initiated the amendments in a report transmitted by the President to Congress, recommended the adop-

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§ 402 (c)(1)(C); and widowers' benefits, §402 (f)(1)(D). (Certain children are "deemed" dependent, § 402 (d)(3). This presumption was upheld as sufficiently accurate to pass scrutiny on grounds of "administrative convenience," *Mathews* v. *Lucas*, 427 U. S. 495 (1976).)

[14] This payment essentially amounted to 3½% of the wage earner's earnings while covered, less the amount received as an old-age pension. Social Security Act § 203, 49 Stat. 623.

tion of survivors' benefits because "[t]he payment of monthly benefits to widows and orphans, who are the two chief classes of dependent survivors, would furnish more significant protection than does the payment of lump-sum benefits." H. R. Doc. No. 110, 76th Cong., 1st Sess., 7 (1939).[15] In addition to recommending survivors' benefits, the Board suggested the extension of old-age pension benefits "for the aged dependent wife of the retired worker." [16] *Id.*, at 6. On the Senate floor, Senator Harrison, the principal proponent of the amendments, criticized the then-existing system of benefits because under it "no regard is had as to whether [the covered wage earner] has a dependent wife, or whether he dies leaving a child, widow, or parents." 84 Cong. Rec. 8827 (1939). There is no indication whatever in any of the legislative history that Congress gave any attention to the specific case of nondependent widows, and found that they were in need of benefits despite their lack of dependency, in order to compensate them for disadvantages caused by sex discrimination. There is every indication that, as *Wiesenfeld* recognized, 420 U. S., at 644, "the framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children.' D. Hoskins & L. Bixby, Women and

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[15] See also remarks of Senator Harrison, 84 Cong. Rec. 8827 (1939). To the extent that this statement indicates that Congress found widows and orphans needier *than other dependents*, it may support a discrimination between dependent widows and dependent widowers, but it certainly demonstrates a congressional assumption that widows are dependent, rather than an intention to aid nondependent widows because of a finding that they are needier than nondependent widowers.

[16] See also Final Report of the Advisory Council on Social Security in Hearings on the Social Security Act Amendments of 1939 before the House Committee on Ways and Means, 76th Cong., 1st Sess., 30 (1939): "The inadequacy of the benefits payable during the early years of the old-age insurance program is more marked where the benefits must support not only the annuitant himself but also his wife."

Social Security: Law and Policy in Five Countries, Social Security Administration Research Report No. 42, p. 77 (1973)." [17]

Survivors' and old-age benefits were not extended to husbands and widowers until 1950. 64 Stat. 483, 485. The legislative history of this provision also demonstrates that Congress did not create the disparity between nondependent widows and widowers with a compensatory purpose. The impetus for change came from the Advisory Council on Social Security, which recommended benefits for "the aged, dependent husband . . . [and] widower." The purpose of this recommendation was "*[t]o equalize the protection given to the dependents of women and men*" because "*[u]nder the present program, insured women lack some of the rights which insured men can acquire.*" Advisory Council on Social Security, Recommendations for Social Security Legislation, S. Doc. No. 208, 80th Cong., 2d Sess., 38 (1949). (Emphasis supplied in part.) It is clear from the report that the Advisory Council assumed that the provision of benefits to dependent husbands and widowers was the equivalent of the provision of benefits to wives and widows under the previous statute, and not a lesser protection deliberately made because of lesser need. Although the original bill, H. R. 6000, that became the Social Security Act Amendments of 1950 did not contain a provision for husbands' and widowers' benefits, the Senate Finance Committee added it, because "the committee believes that protection given to dependents of women and men should be made more comparable." S. Rep. No. 1669, 81st Cong., 2d Sess., 28 (1950). In 1950, as in 1939, there was simply no indication of an intention to create a differential treatment for the benefit of nondependent wives.

We conclude, therefore, that the differential treatment of nondependent widows and widowers results not, as appellant

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[17] See also the further excerpts from and discussion of the legislative history in *Wiesenfeld*, 420 U. S., at 644 n. 13.

asserts, from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent. This presents precisely the situation faced in *Frontiero* and *Wiesenfeld*. The only conceivable justification for writing the presumption of wives' dependency into the statute is the assumption, not verified by the Government in *Frontiero*, 411 U. S., at 689, or here, but based simply on "archaic and overbroad" generalizations, *Schlesinger* v. *Ballard*, 419 U. S., at 508, that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes.[18] We held in *Frontiero*, and again in *Wiesenfeld*, and therefore hold again here, that such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.

Affirmed.

MR. JUSTICE STEVENS, concurring in the judgment.

Although my conclusion is the same, my appraisal of the relevant discrimination and my reasons for concluding that it is unjustified, are somewhat different from those expressed by MR. JUSTICE BRENNAN.

First, I agree with MR. JUSTICE REHNQUIST that the constitutional question raised by this plaintiff requires us to focus on his claim for benefits rather than his deceased wife's tax obligation. She had no contractual right to receive benefits or to control their payment; moreover, the payments are not a form of compensation for her services.[1] At the same salary

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[18] In fact, the legislative history suggests that Congress proceeded casually on a "then generally accepted" stereotype and did not focus on the possible expense of determining dependence in every case.

[1] For this reason this case is not controlled by *Frontiero* v. *Richardson*, 411 U. S. 677.

level, all workers must pay the same tax, whether they are male or female, married or single, old or young, the head of a large family or a small one. The benefits which may ultimately become payable to them or to a wide variety of beneficiaries—including their families, their spouses, future spouses, and even their ex-wives—vary enormously, but such variations do not convert a uniform tax obligation into an unequal one. The discrimination against this plaintiff would be the same if the benefits were funded from general revenues. In short, I am persuaded that the relevant discrimination in this case is against surviving male spouses, rather than against deceased female wage earners.[2]

Second, I also agree with MR. JUSTICE REHNQUIST that a classification which treats certain aged widows[3] more favorably than their male counterparts is not "invidious." Such a classification does not imply that males are inferior to females, cf. *Mathews* v. *Lucas*, 427 U. S. 495, 516 (STEVENS, J., dissenting); does not condemn a large class on the basis of the misconduct of an unrepresentative few, cf. *Craig* v. *Boren*, 429 U. S. 190, 211 (STEVENS, J., concurring); and does not add to the burdens of an already disadvantaged discrete minority.

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[2] The contrary analysis in *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 646–647, was not necessary to the decision of that case. See *id.*, at 655 (REHNQUIST, J., concurring in result).

[3] In most cases the statutory scheme for the distribution of benefits to the surviving spouses of deceased persons who paid FICA taxes on their earnings does not involve any discrimination on account of sex. Dependent spouses of both sexes are eligible; also, nondependent surviving spouses of both sexes are ineligible if their own social security retirement benefits are as large as those of their deceased spouses. There is, however, a narrow area in which the eligibility of nondependent spouses depends solely on their sex: Those who received between 50% and 75% of their support from their deceased spouses are eligible for benefits if they are female, but not if they are male. Similarly, if their earnings were not covered by the Social Security Act, as was true of the plaintiff in this case, and their earnings were less than 75% of the decedent's, they are eligible if they are female, but not if they are male. See *ante*, at 201–202, n. 1.

Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 102. It does, however, treat similarly situated persons differently solely because they are not of the same sex.

Third, MR. JUSTICE REHNQUIST correctly identifies two hypothetical justifications for this discrimination that are comparable to those the Court found acceptable in *Mathews* v. *Lucas*, *supra*, and *Kahn* v. *Shevin*, 416 U. S. 351. Neither the "administrative convenience" rationale of *Lucas*, nor the "policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," *Kahn* v. *Shevin*, *supra*, at 355, can be described as wholly irrational. Nevertheless, I find both justifications unacceptable in this case.

The administrative-convenience rationale rests on the assumption that the cost of providing benefits to nondependent widows is justified by eliminating the burden of requiring those who are dependent to establish that fact. MR. JUSTICE REHNQUIST's careful analysis of the relevant data, see *post*, at 238–239, n. 7, demonstrates that at present only about 10% of the married women in the relevant age bracket are nondependent. Omitting any requirement that widows establish dependency therefore expedites the processing of about 90% of the applications. This convenience must be regarded as significant even though procedures could certainly be developed to minimize the burden.[4]

But what is the offsetting cost that Congress imposed on the Nation in order to achieve this administrative convenience? Assuming that Congress intended only to benefit dependent spouses, and that it has authorized payments to

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[4] Dependency in the statutory sense is a clearly defined criterion for eligibility which would have to be applied only once for each applicant. It is a requirement which several other classes of potential beneficiaries are required to meet. Moreover, the requirement would be especially easy to apply since 77% of the women over 55 do not work. (See *post*, at 238 n. 7.)

nondependent widows to save the cost of administering a dependency requirement for widows, it has paid a truly staggering price for a relatively modest administrative gain: The cost of payments to the hundreds of thousands of widows who are not within the described purpose of the statute is perhaps $750 million a year.[5] The figures for earlier years were presumably smaller, but must still have been large in relation to the possible administrative savings. It is inconceivable that Congress would have authorized such large expenditures for an administrative purpose without the benefit of any cost analysis, or indeed, without even discussing the problem. I am therefore convinced that administrative convenience was not the actual reason for the discrimination.[6]

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[5] As of 1974, 3,546,000 women received widows' benefits. (This figure does not include "dually entitled" women who also received benefits on their own social security accounts.) Task Force on Women and Social Security, Women and Social Security: Adapting to a New Era, prepared for the Senate Special Committee on Aging, 94th Cong., 1st Sess., 84 (Comm. Print 1975). Using MR. JUSTICE REHNQUIST'S estimate, 10% of these women, or 354,600, are actually nondependent. The Secretary informs us that the average yearly widower's benefit is $2,213. Brief for Appellant 5A. Assuming that this figure also applies to widows, a total of $784,729,800 is now being paid to widows who are not actually dependent. Under similar Social Security provisions, 42 U. S. C. §§ 402 (b), (c)(1)(C) (1970 ed. and Supp. V), men but not women whose spouses have retired must prove dependency to qualify for benefits. Calculations based on the same sources and assumptions indicate that each of 270,100 nondependent wives receives $1,168, a total of $315,476,800. Thus, the cost of this administrative convenience amounts to approximately $1 billion each year.

[6] The Secretary appears to concede that this was not the justification. Brief for Appellant 22. Moreover, a 1957 amendment to the statute is inconsistent with this justification. Widow's benefits were originally not payable to a widow who had lived apart from her husband unless she had been "receiving regular contributions from him toward her support" or unless a court had ordered him to pay support. § 209 (n), 53 Stat. 1378. This provision was retained for widows in 1950 when benefits were extended to dependent widowers. § 216 (h)(2), 64 Stat. 511. The requirement that a widow who had lived separately from her husband receive at least some

It is also clear that the disparate treatment of widows and widowers is not the product of a conscious purpose to redress the "legacy of economic discrimination" against females. *Kahn* v. *Shevin*, *supra*, at 359 (BRENNAN, J., dissenting). The widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands. Such a widow is the least likely to need special benefits. The widow most in need is the one who is "suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." 416 U. S., at 354. To accept the *Kahn* justification we must presume that Congress deliberately gave a special benefit to those females least likely to have been victims of the historic discrimination discussed in *Kahn*. Respect for the legislative process precludes the assumption that the statutory discrimination is the product of such irrational lawmaking.

The step-by-step evolution of this statutory scheme included a legislative decision to provide benefits for all widows and a separate decision to provide benefits for dependent widowers. Admittedly, each of these separate judgments has

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support from him, makes sense if Congress was concerned with the statutory 50% test for dependency; such widows are obviously far less likely to meet that test than widows who had lived with their husbands. But Congress deleted the provision in 1957 and extended benefits to all widows, including those who lived apart from their husbands, with no requirement of support, § 216 (h), 71 Stat. 518. The 1957 amendment is affirmative evidence that Congress intended to provide benefits for all widows regardless of whether they could satisfy the statutory dependency test. It is also noteworthy that elsewhere in the statute Congress indicated its intention to create a presumption of dependency by stating that certain family members are "deemed dependent" under certain circumstances. See § 202 (d) (3), 42 U. S. C. § 402 (d) (3).

For the reasons stated in Part IV–B of MR. JUSTICE BRENNAN's opinion, the Secretary's alternative explanation of the statute as being a welfare measure intended to alleviate the poverty of elderly widows is plainly unacceptable.

a rational and benign purpose. But I consider it clear that Congress never focused its attention on the question whether to divide nondependent surviving spouses into two classes on the basis of sex.[7] The history of the statute is entirely consistent with the view that Congress simply assumed that all widows should be regarded as "dependents" in some general sense, even though they could not satisfy the statutory support test later imposed on men.[8] It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." That kind of automatic reflex is far different from either a legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows.

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[7] One indication that the 1939 Act was not the result of a focused decision concerning the needs of nondependent widows vis-à-vis widowers is the breadth of the statutory classification. Under the 1939 Act:

"[C]hildren of covered female workers were eligible for survivors' benefits only in limited circumstances . . . and no benefits whatever were made available to husbands or widowers on the basis of their wives' covered employment." *Weinberger* v. *Wiesenfeld*, 420 U. S., at 643–644.

The disqualification of a woman's surviving children if they had received any support from their father, § 202 (c)(4), 53 Stat. 1365, is particularly difficult to reconcile with the theory that the legislative motive was a conscious desire to remedy sex discrimination.

Similarly, in extending benefits to dependent widowers, Congress made no mention of any determination that nondependent widowers were less needy than nondependent widows, or that nondependent widows deserved greater benefits as a remedy for sex discrimination. See *ante*, at 216.

[8] The discriminatory feature of the statute can be said to be the fact that women are given the benefit of a broad, vague definition of "dependent" while men are held to a harsh arithmetic standard. This serves to answer the argument that appellee will receive a windfall by a judgment in his favor. Although appellee is not a dependent in the definition applied to widowers, it cannot be said with assurance that he is not a dependent in whatever broad sense Congress had in mind when it classified all widows as dependents.

I am therefore persuaded that this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest" put forward by the Government as its justification. See *Hampton* v. *Mow Sun Wong*, 426 U. S., at 103.[9] In my judgment, something more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses.

But if my judgment is correct, what is to be said about *Kahn* v. *Shevin*? For that case involved a discrimination between surviving spouses which originated in 1885; a discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th century presumption that females are inferior to males.[10] It

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[9] In the absence of evidence to the contrary, we might presume that Congress had such an interest in mind, see *Hampton* v. *Mow Sun Wong*, 426 U. S., at 103, but here that presumption is untenable. Perhaps an actual, considered legislative choice would be sufficient to allow this statute to be upheld, but that is a question I would reserve until such a choice has been made.

[10] This presumption was expressly recognized in the literature of the 19th century. It was this presumption that Mr. Bumble ridiculed when he disclaimed responsibility for his wife's misconduct. Because a part of his disclaimer is so well known, it may not be inappropriate to quote the entire passage:

"'It was all Mrs. Bumble. She *would* do it,' urged Mr. Bumble; first looking round to ascertain that his partner had left the room.

"'That is no excuse,' replied Mr. Brownlow. 'You were present on the occasion of the destruction of these trinkets, and, indeed, are the more guilty of the two, in the eye of the law; *for the law supposes that your wife acts under your direction.*

"'If the law supposes that,' said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass—a idiot. If that's the eye of the

seems clear, therefore, that the Court upheld the Florida statute on the basis of a hypothetical justification for the discrimination which had nothing to do with the legislature's actual motivation. On this premise, I would be required to regard *Kahn* as controlling in this case, were it not for the fact that I believe precisely the same analysis applies to *Weinberger* v. *Wiesenfeld*, 420 U. S. 636.

In *Wiesenfeld*, the Court rejected an attempt to use "mere recitation of a benign, compensatory purpose" as "an automatic shield," *id.*, at 648, for a statute which was actually based on "'archaic and overbroad' generalization[s]," *id.*, at 643. In *Wiesenfeld*, as in this case, the victims of the statutory discrimination were widowers. They were totally excluded from eligibility for benefits available to similarly situated widows, just as in this case nondependent widowers are totally excluded from eligibility for benefits payable to nondependent widows. The exclusion in *Wiesenfeld* was apparently the accidental byproduct of the same kind of legislative process that gave rise to *Kahn* and to this case. If there is inconsistency between *Kahn* and *Wiesenfeld*, as I believe there is, it is appropriate to follow the later unanimous holding rather than the earlier, sharply divided decision. And if the cases are distinguishable, *Wiesenfeld* is closer on its facts to this case than is *Kahn*.

For these reasons, and on the authority of the *holding* in *Wiesenfeld*, I concur in the Court's judgment.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join, dissenting.

In light of this Court's recent decisions beginning with *Reed* v. *Reed*, 404 U. S. 71 (1971), one cannot say that

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law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience.'" C. Dickens, The Adventures of Oliver Twist, c. LI (emphasis added).

there is no support in our cases for the result reached by the Court. One can, however, believe as I do that careful consideration of these cases affords more support for the opposite result than it does for that reached by the Court. Indeed, it seems to me that there are two largely separate principles which may be deduced from these cases which indicate that the Court has reached the wrong result.

The first of these principles is that cases requiring heightened levels of scrutiny for particular classifications under the Equal Protection Clause, which have originated in areas of the law outside of the field of social insurance legislation, will not be uncritically carried over into that field. This does not mean that the phrase "social insurance" is some sort of magic phrase which automatically mutes the requirements of the equal protection component of the Fifth Amendment. But it does suggest that in a legislative system which distributes benefit payments among literally millions of people there are at least two characteristics which are not found in many other types of statutes. The first is that the statutory scheme will typically have been expanded by amendment over a period of years so that it is virtually impossible to say that a particular amendment fits with mathematical nicety into a carefully conceived overall plan for payment of benefits. The second is that what in many other areas of the law will be relatively low-level considerations of "administrative convenience" will in this area of the law bear a much more vital relation to the overall legislative plan because of congressional concern for certainty in determination of entitlement and promptness in payment of benefits.

The second principle upon which I believe this legislative classification should be sustained is that set forth in our opinion in *Kahn* v. *Shevin*, 416 U. S. 351 (1974). The effect of the statutory scheme is to make it easier for widows to obtain benefits than it is for widowers, since the former

qualify automatically while the latter must show proof of need. Such a requirement in no way perpetuates or exacerbates the economic disadvantage which has led the Court to conclude that gender-based discrimination must meet a different test from other types of classifications. It is, like the property tax exemption to widows in *Kahn*, a differing treatment which "'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Id.*, at 355.

I

Both *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), are undoubtedly relevant to the decision of this case, but the plurality overstates that relevance when it says that these two cases "plainly require affirmance of the judgment of the District Court." *Ante*, at 204. The disparate treatment of widows and widowers by this Act is undoubtedly a gender-based classification, but this is the beginning and not the end of the inquiry. In the case of classifications based on legitimacy, and in the case of irrebuttable presumptions, constitutional doctrine which would have invalidated the same distinctions in other contexts has been held not to require that result when they were used within comprehensive schemes for social insurance. The same result should obtain in the case of constitutional principles dealing with gender-based distinctions.

In *Levy* v. *Louisiana*, 391 U. S. 68 (1968), the Court held that a Louisiana statute which allowed legitimate but not illegitimate children to recover for the wrongful death of their mother violated the Equal Protection Clause of the Fourteenth Amendment. Another Louisiana statute was challenged on similar grounds in *Weber* v. *Aetna Cas. & Surety Co.*, 406 U. S. 164 (1972). The statute in *Weber* was defended on the ground that it did not preclude entirely

the recovery of workmen's compensation by illegitimate children, since acknowledged illegitimates were permitted to recover on the same basis as legitimate children. The Court rejected that distinction, however, and held that this statute also violated the Equal Protection Clause.

Two Terms later we held invalid under the Fifth Amendment a portion of the child's benefits provisions of the Social Security Act. The challenged provision flatly excluded one class of illegitimate children notwithstanding their actual dependence upon a disabled parent, while granting benefits to other classes of illegitimates and to legitimates on the basis of demonstrated or presumed dependence upon such a parent. *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974). We relied on our earlier decision in *Weber*, *supra*, to reach this result.

Last Term, however, in *Mathews* v. *Lucas*, 427 U. S. 495 (1976), we upheld the portion of these same child's benefits provisions which conclusively presume dependency for all but a specified group of illegitimate children. This use of illegitimacy to define a group required to present proof of dependency was held not to deny equal protection to those singled out.

In *Stanley* v. *Illinois*, 405 U. S. 645 (1972), we held that Illinois might not under the equal protection guarantee of the Fourteenth Amendment deny a hearing on parental fitness to an unwed father when such a hearing was granted to all other parents whose custody of their children was challenged. In *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), we likewise held invalid school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing four or five months before their expected birth.

Yet, the Term following *LaFleur*, we decided *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), in which a three-judge District Court had held invalid a duration-of-relationship requirement

for surviving wives in order that they might receive benefits under the Social Security Act. The District Court relied on *Stanley* and *LaFleur*, but we declined to extend those cases into the area of a complex social insurance scheme such as this Act, saying:

> "We think that the District Court's extension of the holdings of *Stanley*, *Vlandis*, and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." 422 U. S., at 772.

The Court's recent treatment of gender-based discrimination begins with *Reed* v. *Reed*, 404 U. S. 71 (1971), in which the Court invalidated a provision of the Idaho probate code which contained an across-the-board flat preference for men over women as putative administrators of the estate of a decedent. The following Term we relied on the equal protection component of the Fifth Amendment to hold invalid an Act of Congress relating to military pay which allowed a male member of the uniformed services to claim his wife as a dependent without any showing of such a fact, but which required a female member to show that her husband was in fact dependent on her before she could make such a claim. The consequences of spousal dependency were increased fringe benefits which had been provided in an effort to make the uniformed services competitive with business and industry. *Frontiero* v. *Richardson*, *supra*, at 679.

The next Term, however, we refused to invalidate at the behest of a male property taxpayer a provision of Florida law which allowed widows, but not widowers, an exemption from property taxation in the amount of $500. *Kahn* v. *Shevin*, 416 U. S. 351 (1974). *Weinberger* v. *Wiesenfeld*, decided one year later, relied on *Frontiero*, *supra*, in holding invalid a section of the Social Security Act which allowed

benefits to a surviving widow but flatly denied them to a surviving widower. The Court said:

> "Since the gender-based classification of § 402 (g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero.* Like the statutes there, '[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause.' *Reed* v. *Reed,* 404 U. S. 71, 77 (1971)." 420 U. S., at 653.

Two observations about *Wiesenfeld* are pertinent. First, the provision of the Social Security Act held unconstitutional there flatly denied surviving widowers the possibility of obtaining benefits no matter what showing of need might be made. The section under attack in the instant case does not totally foreclose widowers, but simply requires from them a proof of dependency which is not required from similarly situated widows. Second, *Wiesenfeld* was decided before either *Weinberger* v. *Salfi, supra,* or *Mathews* v. *Lucas, supra.* Each of those decisions refused uncritically to extend into the field of social security law constitutional proscriptions against distinctions based on illegitimacy and irrebuttable presumptions which had originated in other areas of the law. While the holding of *Wiesenfeld* is not inconsistent with *Salfi* or *Lucas,* its reasoning is not in complete harmony with the recognition in those cases of the special characteristics of social insurance plans.

II

Those special characteristics arise from the nature of the legislative problem which numerous sessions of Congress have had to face in defining the coverage of the Social Security Act. The program has been participatory from the outset, in the sense that benefits have not been extended to persons

without at least a close relationship to a person paying into the system during his working life. But Congress did not legislate with the idea that it was fulfilling any narrow contractual obligation owed to the program participant. On the contrary, Congress has continually increased the amounts of benefits paid, and expanded the pool of eligible recipients by singling out additional, identifiable groups having both the requisite relationship to the contributing worker and a degree of probable need which, in the legislative judgment, justifies assistance. It is not difficult to predict some traits of the system emerging from this sort of step-by-step legislative expansion.

One is that the resulting statute, like the process which produced it, extends benefits in a piecemeal fashion. There will be some individuals with needs demonstrably as great as those within a class of qualifying beneficiaries who will nonetheless be treated less favorably than that class. This is because these classes, formulated and reformulated over a period of decades, could not perfectly mirror the abstract definition of equality of need unless Congress were to burden the system with numerous individualized determinations which might frustrate the primary purposes of the Act.

Another characteristic of the Social Security statute which is predictable from the manner of its enactment, is the balance between a desire that payments correlate with degree of need and a recognition that precise correlation is unattainable given the administrative realities of the situation. No one would contend, for example, that all wives of program participants, who are over 62 and entitled to old-age or disability-insurance benefits in their own right equal to no more than one-half of their husband's primary amount, are needy. Nonetheless the administrative problems of determining actual need have led Congress to employ these and factors like them as the determinants of eligibility. 42 U. S. C. § 402 (b)(1) (1970 ed. and Supp. V). The overin-

clusiveness of such categorizations is, in many cases, not only tolerable but Solomonic. For had Congress attempted to distribute program funds in precise accordance with a purpose to alleviate need, it could very well have created a procedural leviathan consuming substantial amounts of those funds in case-by-case determinations of eligibility.

The provisions at issue in this case, relating to widows' and widowers' benefits, display all the earmarks of their origins in the oft-repeated process of legislative reconsideration and expansion of beneficiary groups. As originally enacted in 1935, the Social Security Act provided for old-age benefits only to the wage earner. 49 Stat. 623. In 1939, additional provisions were made for benefits to the wage earner's family, including wives and widows, but not including husbands and widowers. The widow's benefit was in an amount larger by one-half than that for the wife, and was available notwithstanding the widow's primary entitlement to benefits in an amount greater than permissible in the case of a wife.[1] All things considered, the 1939 amendments

[1] It is noteworthy that Congress did not simply state generally that immediate family members were entitled to benefits in a certain amount, but set forth several categories of benefits for family members, with unique conditions and benefit amounts attaching to each.

"Wife's Insurance Benefits" in the amount of one-half the husband's primary benefit, were to be given to a program participant's wife if she was over 65, lived with her husband (or received support from him, see 53 Stat. 1378) at the time of filing her application, and was not entitled to primary benefits of her own in an amount equal to or greater than one-half of her husband's primary amount.

"Widow's Insurance Benefits" equal to three-fourths the deceased husband's primary benefit, were made available to an unmarried widow over 65, who lived with the wage earner (or received support from him) at the time of his death, and was not entitled to primary benefits on her own equal to or greater than three-fourths of the husband's primary amount.

In addition, "Widow's Current Insurance Benefits" were made available to one failing to qualify for the widow's benefit solely on account of age, who had in her care a child qualifying for "Child's Insurance Benefits"

reflect a legislative judgment that elderly wives and widows of Social Security recipients were needy groups, and that of the two, the plight of widows was especially severe.[2] I agree with the plurality's statement that "[t]here is no indication whatever in any of the legislative history that Congress

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under still another section of the amended statute. The amendments also provided for "Parent's Insurance Benefit" and "Lump-Sum Death Payments." 53 Stat. 1364–1367.

The manner in which these provisions were drafted makes clear that each involved a separate congressional judgment about the most appropriate definition and actual needs of each group.

[2] The Final Report of the Advisory Council on Social Security explained the provision as follows:

"The day of large families and of the farm economy, when aged parents were thereby assured comfort in their declining years, has passed for a large proportion of our population. This change has had particularly devastating effect on the sense of security of the aged women of our country.

"Women as a rule live longer than men. Wives are often younger than their husbands. Consequently, the probabilities are that a woman will outlive her husband. Old-age insurance benefits for the husband, supplemented during his life by an allowance payable on behalf of his wife, fall considerably short, therefore, of providing adequate old-age security." Hearings on Social Security Act Amendments of 1939 before the House Committee on Ways and Means, 76th Cong., 1st Sess., 31–32 (1939).

Likewise, the House Committee Report described widows over 65, widows with children, orphans, and dependent parents over 65 (to whom the 1939 amendments extended benefits) as the "groups of survivors whose probable need is greatest." H. R. Rep. No. 728, 76th Cong., 1st Sess., 11 (1939). Thus, there is good reason to suppose that the 1939 enactment of a provision for widow's benefits was in response to congressional perception of substantial poverty among the large group of aged widows.

The problem persists today in proportions far greater than among the parallel group of aged widowers. In 1974, two out of three poor persons over 65 were women. Four out of five men over 65 were married, but 52% of aged women were widows. Of older women living alone, 33.4% were below the poverty line. Task Force on Women and Social Security, Women and Social Security: Adapting to a New Era, prepared for the Senate Special Committee on Aging, 94th Cong., 1st Sess., 37, 42, 68–69 (Comm. Print 1975).

gave any attention to the specific case of nondependent widows, and found that they were in need of benefits despite their lack of dependency . . . ." *Ante,* at 215. But neither is there any reason to doubt that it singled out the group of aged widows for especially favorable treatment, see n. 1, *supra,* because it saw prevalent throughout that group a characteristically high level of need.

In 1950, Congress created two new categories of old-age and survivors' insurance benefits—for husbands and widowers. With one exception, these provisions were identical to the sections dealing with wives' and widows' benefits. A husband or widower was required additionally to prove that he had been dependent upon his wife for half of his support at the time she became eligible for benefits, or, in the case of the widower, at the time of her death. 64 Stat. 483, 485. This enactment obviously reflected a congressional judgment that there were needy persons in those groups who should properly be able to receive benefits, but that their numbers were not so great as to justify automatic qualification on the basis of age and marriage to a wage-earning wife. Proof of dependence upon the wife for one-half of a husband's support was adopted as a suitable means of eliminating large numbers of men with independent incomes, while preserving an entitlement to benefits in the cases of those shown to lack substantial means of support apart from funds actually brought in by the wife.

Subsequent amendments have altered the statute somewhat—predictably in the direction of expanded coverage [3]—

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[3] Among these changes are the lowering of the age of eligibility, the elimination, concerning spouse's and surviving spouse's benefits, of any requirement of cohabitation, and the increase in widow's and widower's benefits and in permissible primary benefits received in the beneficiary's own right from 75% to 100% of the wage earner's primary benefit. Also, additional provision has been made, under each spousal category of benefits, for a divorced spouse who was married to the wage earner for at least 20 years. This Court has recently upheld unanimously the wife's

but as relevant to this case the basic scheme has remained unchanged. The present statutory treatment of widows and widowers would seem to reflect a pair of legislative judgments about the needs of those two groups. The first is that the persons qualifying for spousal benefits are likely to have even more substantial needs after the passing of their spouse. This is indicated both by the increase in benefits to qualifying widows and widowers which now stand at 100% of the primary amount compared with the 50% paid to spouses,[4] and by the increase in the amount of primary benefits that a person may separately receive without losing entitlement to benefits under the spouse's account. While the spouse of a living wage earner loses such entitlement upon receipt of his or her own primary benefits equal to 50% of the wage earner's primary amount, a *surviving* spouse does not lose such entitlement until receiving separate benefits equal to 100%.[5]

The second legislative judgment implicit in the widow's and widower's provisions is that widows, as a practical matter, are much more likely to be without adequate means of support than are widowers. The plurality opinion makes much of establishing this point, *ante*, at 212–217, that the absence of any dependency prerequisite to the award of widow's benefits reflects a judgment, resting on "administrative convenience," that dependence among aged widows is frequent enough to justify waiving the requirement entirely. I differ not with the recognition of this administrative convenience

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benefits section's imposition of the minimum-age requirement upon divorced wives with qualifying minor children, while waiving it in the case of undivorced wives caring for such children. *Mathews* v. *De Castro*, 429 U. S. 181 (1976).

[4] 42 U. S. C. §§ 402 (b)(2), (c)(3), (e)(2)(A), (f)(3)(A) (1970 ed. and Supp. V).

[5] 42 U. S. C. §§ 402 (b)(1)(D), (c)(1)(D), (e)(1)(D), (f)(1)(E) (1970 ed. and Supp. V).

purpose but with the conclusion that such a purpose *necessarily* invalidates the resulting classification. Our decisions dealing with social welfare legislation indicate that our inquiry must go further. For rational classifications aimed at distributing funds to beneficiaries under social insurance legislation weigh a good deal more heavily on the governmental interest side of the equal protection balance than they may in other legislative contexts. The "administrative convenience" which is afforded by such classifications in choosing the administrator of a decedent's estate, see *Reed* v. *Reed*, 404 U. S. 71 (1971), is significantly less important to the effectiveness of the legislative scheme than is the "convenience" afforded by classifications in administering an Act designed to provide benefits to millions upon millions of beneficiaries with promptness and certainty. For this reason, the plurality errs in merely dispatching this statute with an incantation of "administrative convenience." It should go further and consider the governmental interest advanced by the statutory classification in a social insurance statute such as this, in light of the claimed injury to appellee.

III

Whatever his actual needs, Goldfarb would, of course, have no complaint if Congress had chosen to require proof of dependency by widows as well as widowers, or if it had simply refrained from making any provision whatever for benefits to surviving spouses. "A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955)." *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972); *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970). See *Geduldig* v. *Aiello*, 417 U. S. 484, 495 (1974); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911). Any claim which he has must therefore turn upon the alleged impropriety of giving benefits to widows

without requiring them to make the same proof of dependency required of widowers. Yet, in the context of the legislative purpose, this amounts not to exclusion but to overinclusiveness for reasons of administrative convenience which, if reasonably supported by the underlying facts, is not offensive to the Equal Protection Clause in social welfare cases.

A close analogue to this case is presented by our decision last Term in *Mathews* v. *Lucas*, 427 U. S. 495 (1976). The plaintiffs there challenged the OASDI provisions for children's benefits, which require no proof of dependency by legitimate children or certain categories of illegitimates,[6] but which demand that other illegitimates show dependency by proof that their father lived with them or contributed to their support prior to his death. After first stating that this classification based on legitimacy does not demand "our most exacting scrutiny," *id.*, at 506, the Court concluded that a general requirement of dependency "at the time of death is not impermissibly discriminatory in providing only for those children for whom the loss of the parent is an immediate source of the need." *Id.*, at 507. It then upheld the waiver of the dependency proof requirement for legitimates and certain others, by the following reasoning:

> "The basis for appellees' argument is the obvious fact that each of the presumptions of dependency renders the class of benefit-recipients incrementally overinclusive, in the sense that some children within each class of

[6] Notwithstanding their illegitimacy, children need not demonstrate dependency if entitled to inherit from the insured parent under the state intestacy laws; if the decedent went through a marriage ceremony with the other parent which would have been valid but for a nonobvious legal defect; if the decedent had acknowledged the child in writing; or if he had been decreed to be the child's father or ordered by a court to support the child because the child was his. 42 U. S. C. §§ 402 (d), 416 (h) (1970 ed. and Supp. V).

presumptive dependents are automatically entitled to benefits under the statute although they could not in fact prove their economic dependence upon insured wage earners at the time of death. We conclude that the statutory classifications are permissible, however, because they are reasonably related to the likelihood of dependency at death.

"Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience. While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. See *Weinberger* v. *Salfi*, 422 U. S., 749, 772 (1975).

. . . . .

"Applying these principles, we think that the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death." 427 U. S., at 508–509, 510.

The same reasoning should control in the case before us.

As in *Lucas*, Congress has here adopted a test of dependency as a reasonable surrogate for proof of actual need. In *Lucas*, legitimates and certain others were not required to satisfy that test because, in the legislative view, there was a sufficiently high rate of dependency among those groups to make the requirement of actual proof administratively counterproductive. Here the dependency test was not imposed upon widows, apparently on a similar belief that the actual rate of dependency was sufficiently high that a requirement of proof would create more administrative expense than it would save in the award of benefits.[7]

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[7] There is substantial statistical evidence indicating that the differential treatment of widows and widowers is economically justifiable on the basis of administrative convenience. There is good reason to suppose that few enough aged widows are not, in fact, dependent at the time of their husband's death that the costs of administering the test would exceed the savings resulting from its application. Among married couples throughout our population, 43% of the wives as of 1974 are in the labor force. Bureau of the Census, A Statistical Portrait of Women in the United States 52 (Table 10–9) (Apr. 1976). Among those 43%, wives with husbands over 25 years of age contribute a median of 26.1% of the family income. *Ibid.* (Table 10–10). This is approximately equal to the 25% maximum contribution one can make and still be statutorily dependent. It thus follows that among the married population as a whole the number of dependent wives is roughly equal to the sum of those who do not work, plus one-half of those who do (since by definition, one-half contribute more and one-half contribute less than the median of 26.1%). That calculation here leads to a conclusion that about 78.5% (57%+21.5%) of *all* married women are dependent.

With regard to the group of women otherwise qualifying for widow's benefits, this figure is significantly higher. Whereas the employment rate among women between 20 and 54 is about 56%, the rate for women 55 and over is only 23%. (These figures are derived from data appearing *id.*, at 27–28 (Tables 7–1, 7–2).) Because it is dependency at the time of the working spouse's death which is relevant under the statute, the work habits of those over 55 are most relevant for determining the actual number of widows who would be excluded by a dependency test. Even if married women over 55 work as often as unmarried women in that group

IV

Perhaps because the reasons asserted for "heightened scrutiny" of gender-based distinctions are rooted in the fact that *women* have in the past been victims of unfair treatment, see *Frontiero* v. *Richardson*, 411 U. S., at 684–688, the plurality says that the difference in treatment here is not only between a widow and a widower, but between the respective deceased spouses of the two. It concludes that wage-earning wives are deprived "'of protection for their families which men receive as a result of their employment.'" *Ante*, at 206.

But this is a questionable tool of analysis which can be used to prove virtually anything. It might just as well have been urged in *Kahn* v. *Shevin*, 416 U. S. 351 (1974), where we upheld a Florida property tax exemption redounding to the benefit of widows but not widowers, that the real discrimination was between the deceased spouses of the respective widow and widower, who had doubtless by their contributions to the family or marital community helped make possible the acquisition of the property which was now being disparately taxed.

(an unlikelihood, given the greater probability that unmarried women will have no alternative means of support), this 23% figure indicates that they work just over one-half as often as the population of all married women (43% of whom work—*id.*, at 52 (Table 10–9)). This suggests that the number of married women over 55 who would satisfy the dependency test is something like 88.5%—the 77% who do not work, plus half of the remaining 23% who do. This nine-tenths correlation appears sufficiently high to justify extension of benefits to the other one-tenth for reasons of administrative convenience.

On the side of widower's benefits, the incidence of dependent husbands is certainly low enough to justify any administrative expense incurred in screening out those who are not dependent. In 1970, only 2.5% of *working* wives contributed more than the 75% of the family income which renders the husband dependent. F. Linden, Women: A Demographic, Social and Economic Presentation 34 (1973). Since only 43% of all wives work, the incidence of dependent husbands among all married couples is approximately 1% (.025×.43=.0108).

Since the claim to social security benefits is noncontractual in nature, see *Flemming* v. *Nestor,* 363 U. S. 603 (1960), the contributions of the deceased spouse cannot be regarded as creating any sort of contractual entitlement on the part of either the deceased wife or the surviving husband. Here the female wage earner has gotten the degree of protection for her family which Congress was concerned to extend to all. Neither she nor her surviving husband has any constitutional claim to more, simply because Congress has chosen, for administrative reasons, to give benefits to widows without requiring proof of dependency.

Viewed from the perspective of the recipient of benefits, the sections involved here are entirely distinguishable from those which this Court has previously struck down. In *Jimenez* v. *Weinberger,* 417 U. S. 628 (1974), the Court invalidated one aspect of the provisions for surviving children's benefits which were considered in *Mathews* v. *Lucas,* 427 U. S. 495 (1976). Those provisions allow legitimate and certain categories of illegitimate children [8] to receive benefits, whether born before or after the onset of the wage earner's disability. Other illegitimates were entitled to benefits only upon a showing of dependency *prior to the disability,* and were therefore conclusively denied benefits if born after the wage earner was disabled. Finding a legislative purpose to aid children with needs demonstrated by a dependency relationship to a disabled worker, the Court found equal protection offended by the statute's denial to some children of any opportunity to prove that they were within that class.

In *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975), the Court again invalidated OASDI provisions which denied one group any opportunity to show themselves proper beneficiaries given the apparent statutory purpose. A widow not qualifying for widow's benefits was entitled to a mother's benefit if she had in her care a minor child qualifying for a child's

[8] See n. 6, *supra.*

benefit, and if she did not receive more than a certain amount of primary benefits in her own right. No such provision was made, however, for a widower in a parallel position. The Court found a purpose in the statute to allow a single parent to stay home and care for the minor child, *id.*, at 648–649, and struck down the denial of benefits to fathers similarly situated. The defect of that statute was its conclusive exception of widowers from the benefited class, solely on the basis of their sex, and in contravention of the legislative purpose to allow parents with deceased spouses to provide personal parental care. There is no plausible claim to be made here that a statutory objective is being thwarted by underinclusiveness of the classes of beneficiaries.

This case is also distinguishable from *Frontiero* v. *Richardson, supra,* in the sense that social insurance differs from compensation for work done. While there is no basis for assessing the propriety of a given allocation of funds within a social insurance program apart from an identifiable legislative purpose, a compensatory scheme may be evaluated under the principle of equal pay for equal work done. This case is therefore unlike *Frontiero,* where the Court invalidated sex discrimination among military personnel in their entitlement to increased quarters allowances on account of marriage, and in the eligibility of their spouses for dental and medical care. These compensatory fringe benefits were available to male employees as a matter of course, but were unavailable to females except on proof that their husbands depended on them for over one-half of their support. Since males got such compensatory benefits even though their wives were not so dependent, females with nondependent husbands were effectively denied equal compensation for equal effort. The same is not true here, where the benefit payments to survivors are neither contractual nor compensatory for work done, and where there is thus no comparative basis for evaluating the propriety of a given benefit apart from the legislative purpose.

V

The very most that can be squeezed out of the facts of this case in the way of cognizable "discrimination" is a classification which favors aged widows. Quite apart from any considerations of legislative purpose and "administrative convenience" which may be advanced to support the classification, this is scarcely an invidious discrimination. Two of our recent cases have rejected efforts by men to challenge similar classifications. We have held that it is not improper for the military to formulate "up-or-out" rules taking into account sex-based differences in employment opportunities in a way working to the benefit of women, *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975), or to grant solely to widows a property tax exemption in recognition of their depressed plight. *Kahn* v. *Shevin,* 416 U. S. 351 (1974). A waiver of the dependency prerequisite for benefits, in the case of this same class of aged widows, under a program explicitly aimed at the assistance of needy groups, appears to be well within the holding of the *Kahn* case, which upheld a flat $500 exemption to widows, without any consideration of need.

VI

The classification challenged here is "overinclusive" only in the sense that widows over 62 may obtain benefits without a showing of need, whereas widowers must demonstrate need. Because this overinclusion is rationally justifiable, given available empirical data, on the basis of "administrative convenience," *Mathews* v. *Lucas, supra,* is authority for upholding it. The differentiation in no way perpetuates the economic discrimination which has been the basis for heightened scrutiny of gender-based classifications, and is, in fact, explainable as a measure to ameliorate the characteristically depressed condition of aged widows. *Kahn* v. *Shevin, supra,* is therefore also authority for upholding it. For both of these reasons, I would reverse the judgment of the District Court.

Syllabus

NOLDE BROTHERS, INC. *v.* LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75–1198. Argued November 9, 1976—Decided March 7, 1977

Petitioner corporation entered into a collective-bargaining agreement with respondent Union which contained a provision for severance pay on termination of the employment of certain employees. The agreement, which specified that any grievance arising between the parties was subject to binding arbitration, was to remain in effect until its expiration date and thereafter until execution of a new agreement or the existing agreement was terminated by either party upon seven days' written notice. While contract changes were being negotiated after the contract's expiration date, respondent on August 20, 1973, gave notice of cancellation, and the contract terminated August 27. Negotiations nevertheless continued but ended on August 31, when petitioner, threatened with a strike, informed respondent that it was closing its plant effective that day. Plant operations ceased shortly thereafter. Petitioner paid accrued wages, but rejected respondent's demand for severance pay under the collective-bargaining agreement and declined to arbitrate the claim therefor on the ground that its obligation to do so terminated with the collective-bargaining agreement. Respondent then brought this action in District Court to compel petitioner, *inter alia*, to arbitrate the severance-pay issue. The District Court granted petitioner's motion for summary judgment, holding that the employees' right to severance pay expired with respondent's voluntary termination of the agreement; that consequently there was no longer a severance-pay issue to arbitrate; and that, in any event, the duty to arbitrate ended with the contract. The Court of Appeals reversed, concluding that the parties' arbitration duties under the contract survived its termination with respect to claims arising by reason of the agreement. *Held:* Respondent's claim for severance pay under the expired contract is subject to resolution under the contract's arbitration terms. Pp. 248–255.

(a) The obligations of parties under the arbitration clause of a collective-bargaining agreement may survive contract termination when the dispute is over an obligation arguably created by the expired agreement. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543. Pp. 250–252.

(b) The parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery established by the agreement.

There is nothing in the arbitration clause that expressly excluded from its operation a dispute arising under the contract but based on events occurring after its termination. Absent some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration obligations to end automatically with the contract. Pp. 252–253.

(c) The parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations and drafted their broad arbitration clause against a backdrop of a well-established federal labor policy favoring arbitration as a means of resolving disputes. There is a strong presumption favoring arbitrability. *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582–583. Pp. 253–255.

(d) Where the dispute is over a provision of the expired collective-bargaining agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication. P. 255.

530 F. 2d 548, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 255.

Allan L. Bioff argued the cause for petitioner. With him on the brief was *Leonard Singer*.

Ronald Rosenberg argued the cause for respondent. With him on the brief were *Henry Kaiser, Eugene Gressman, George B. Driesen, Jerry Anker,* and *Gerhard P. Van Arkel.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case raises the question of whether a party to a collective-bargaining contract may be required to arbitrate a contractual dispute over severance pay pursuant to the arbitration clause of that agreement even though the dispute, although governed by the contract, arises after its termination. Only the issue of arbitrability is before us.

(1)

In 1970, petitioner Nolde Brothers, Inc., entered into a collective-bargaining agreement with respondent Local No.

358, of the Bakery & Confectionery Workers Union, AFL–CIO, covering petitioner's Norfolk, Va., bakery employees. Under the contract, "any grievance" arising between the parties was subject to binding arbitration.[1] In addition, the contract contained a provision which provided for severance pay on termination of employment for all employees having three or more years of active service.[2] Vacation rights were

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[1] ARTICLE XII

GRIEVANCES AND ARBITRATION

"Section 1. All grievances shall be first taken up between the Plant Management and the Shop Steward. If these parties shall be unable to settle the grievance, then the Business Agent of the Union shall be called in, in an attempt to arrive at a settlement of the grievance. If these parties are unable to settle the grievance, the dispute will be settled as called for in Sections 2 and 3 of this Article.

"Section 2. In the event that any grievance cannot be satisfactorily adjusted by the procedure outlined above, either of the parties hereto may demand arbitration and shall give written notice to the other party of its desire to arbitrate. No individual employee shall have the right to invoke arbitration without the written consent of the Union. The Arbitration Board shall consist of three (3) persons, one selected by the Company and one selected by the Union. The two persons selected shall agree upon a third person who shall act as Chairman of the Arbitration Board.

"Section 3. The decision or award of the Arbitration Board, or a majority thereof, shall be final and binding on both parties. If the third party to arbitration is not selected in ten (10) days from receipt of notice, the Director of the U. S. Conciliation Service shall be requested to make the appointment. The expense of the neutral arbitrator shall be borne equally by the parties.

"Section 4. Pending negotiations or during arbitration there shall be no strikes, lock-outs, boycotts, or any stoppages of work."

[2] ARTICLE IX

WAGES

. . . . .

"Section 5. Each full-time employee who is permanently displaced from his employment with the Company by reason of the introduction of labor saving equipment, the closing of a department, the closing of an entire plant, or by lay off, shall be compensated for such displacement

also granted employees by the agreement; [3] like severance pay, these rights were geared to an employee's length of service and the amount of his earnings. By its terms, the contract was to remain in effect until July 21, 1973, and thereafter, until such time as either a new agreement was executed between the parties, or the existing agreement was terminated upon seven days' written notice by either party.

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providing he has been actively employed by the Company for a period of at least three (3) years. An eligible employee's compensation for his displacement shall be on the basis of thirty (30) hours of severance pay, at his straight time hourly rate, for each full year or major portion of a year of active employment commencing with the fourth (4th) year following his most recent date of hire. Payment under this formula shall be limited to a maximum of nine hundred (900) hours of severance pay.

"Section 6. No severance pay will be paid to an eligible employee if he:

"(a) accepts employment in another plant of the Company; or

"(b) is voluntarily or involuntarily separated from his employment prior to the date he would otherwise be displaced for one of the reasons stated in Section 5 above."

[3] ARTICLE IV

VACATIONS

"Section 1. Each full time employee is entitled to one week's vacation after one year's service, two (2) weeks' vacation after two (2) years' service, three (3) weeks' vacation after nine (9) years' service, and four (4) weeks' vacation after eighteen (18) years' service. . . .

. . . . . .

"Effective January 1, 1972, the service requirement for the fourth (4th) week of vacation shall be reduced to seventeen (17) years.

"Effective January 1, 1972, each employee with twenty-five (25) or more years of service shall be entitled to a vacation benefit of five (5) weeks.

"Section 2. The anniversary date of employment shall be adjusted by periods of lay-offs or leaves of absence for the purpose of computation of vacation benefits only.

"Section 3. Vacation pay shall be based on straight time at the employee's regular hourly rate for the average number of hours worked by the employee in the thirteen (13) weeks preceding the vacation period, not including holiday weeks or weeks in which time is lost on account of sickness, with a minimum of forty (40) hours' pay and a maximum of forty-eight (48) hours' pay for each week of the vacation allowance."

In May 1973, the parties resumed bargaining after the Union advised Nolde, pursuant to § 8 (d) of the National Labor Relations Act, 29 U. S. C. § 158 (d) (1970 ed., and Supp. V), of its desire to negotiate certain changes in the existing agreement. These negotiations continued without resolution up to, and beyond, the July 21 contract expiration date. On August 20, the Union served the requisite seven days' written notice of its decision to cancel the existing contract. The Union's termination of the contract became effective August 27, 1973.

Despite the contract's cancellation, negotiations continued. They ended, however, on August 31, when Nolde, faced by a threatened strike after the Union had rejected its latest proposal, informed the Union of its decision to close permanently its Norfolk bakery, effective that day. Operations at the plant ceased shortly after midnight on August 31. Nolde then paid employees their accrued wages and accrued vacation pay under the canceled contract; in addition, wages were paid for work performed during the interim between the contract's termination on August 27 and the bakery's closing four days later. However, the company rejected the Union's demand for the severance pay called for in the collective-bargaining agreement. It also declined to arbitrate the severance-pay claim on the ground that its contractual obligation to arbitrate disputes terminated with the collective-bargaining agreement.

The Union then instituted this action in the District Court under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, seeking to compel Nolde to arbitrate the severance-pay issue, or in the alternative, judgment for the severance pay due. The District Court granted Nolde's motion for summary judgment on both issues. It held that the employees' right to severance pay expired with the Union's voluntary termination of the collective-bargaining contract and that, as a result, there was no longer any sev-

erance-pay issue to arbitrate. It went on to note that even if the dispute had been otherwise arbitrable, the duty to arbitrate terminated with the contract that had created it. 382 F. Supp. 1354 (ED Va. 1974).

On appeal, the United States Court of Appeals for the Fourth Circuit reversed. 530 F. 2d 548 (1975). It took the position that the District Court had approached the case from the wrong direction by determining that Nolde's severance-pay obligations had expired with the collective-bargaining agreement before determining whether Nolde's duty to arbitrate the claim survived the contract's termination. Turning to that latter question first, the Court of Appeals concluded that the parties' arbitration duties under the contract survived its termination with respect to claims arising by reason of the collective-bargaining agreement. Having thus determined that the severance-pay issue was one for the arbitrator, the Court of Appeals expressed no views on the merits of the dispute. We granted certiorari to review its determination that the severance-pay claim was arbitrable. 425 U. S. 970 (1976).

(2)

In arguing that Nolde's displaced employees were entitled to severance pay upon the closing of the Norfolk bakery, the Union maintained that the severance wages provided for in the collective-bargaining agreement were in the nature of "accrued" or "vested" rights, earned by employees during the term of the contract on essentially the same basis as vacation pay, but payable only upon termination of employment. In support of this claim, the Union noted that the severance-pay clause is found in the contract under an article entitled "Wages." The inclusion within that provision, it urged, was evidence that the parties considered severance pay as part of the employees' compensation for services performed during the life of the agreement.[4] In addition, the Union

[4] The fact that the amount of severance pay to which an employee is

pointed out that the severance-pay clause itself contained nothing to suggest that the employees' right to severance pay expired if the events triggering payment failed to occur during the life of the contract. Nolde, on the other hand, argued that since severance pay was a creation of the collective-bargaining agreement, its substantive obligation to provide such benefits terminated with the Union's unilateral cancellation of the contract.

As the parties' arguments demonstrate, both the Union's claim for severance pay and Nolde's refusal to pay the same are based on their differing perceptions of a provision of the expired collective-bargaining agreement. The parties may have intended, as Nolde maintained, that any substantive claim to severance pay must surface, if at all, during the contract's term. However, there is also "no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 555 (1964).[5] Of course, in determining the arbitrability of the dispute, the merits of the underlying claim for severance pay are not before us. However, it is clear that, whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute therefore, although arising *after* the expiration of the collective-bargaining contract, clearly arises *under* that contract.

There can be no doubt that a dispute over the meaning of the severance-pay clause during the life of the agreement

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entitled under the collective-bargaining agreement varies according to the length of his employment and the amount of his salary also supports the Union's position that severance pay was nothing more than deferred compensation.

[5] The parties apparently viewed the vacation rights provided by Art. IV of the contract as vested in nature since after the bakery's closing, Nolde, upon the Union's request, paid its former employees all vacation pay which had accrued under the collective-bargaining agreement.

would have been subject to the mandatory grievance-arbitration procedures of the contract. Indeed, since the parties contracted to submit "all grievances" to arbitration, our determination that the Union was "making a claim which on its face is governed by the contract" would end the matter had the contract not been terminated prior to the closing of the plant. *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960). Here, however, Nolde maintains that a different rule must prevail because the event giving rise to the contractual dispute, *i. e.*, the employees' severance upon the bakery's closing, did not occur until after the expiration of the collective-bargaining agreement.

(3)

Nolde contends that the duty to arbitrate, being strictly a creature of contract, must necessarily expire with the collective-bargaining contract that brought it into existence. Hence, it maintains that a court may not compel a party to submit any post-contract grievance to arbitration for the simple reason that no contractual duty to arbitrate survives the agreement's termination. Any other conclusion, Nolde argues, runs contrary to federal labor policy which prohibits the imposition of compulsory arbitration upon parties except when they are bound by an arbitration agreement. In so arguing, Nolde relies on numerous decisions of this Court which it claims establish that "arbitration is a matter of contract and [that] a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960); *e. g.*, *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 374 (1974); *John Wiley & Sons* v. *Livingston*, *supra*, at 547; *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962).

Our prior decisions have indeed held that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in

the absence of a contractual obligation to do so. Adherence to these principles, however, does not require us to hold that termination of a collective-bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration processes began but were not completed, during the contract's term. Yet it could not seriously be contended in either instance that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum. See *John Wiley & Sons, supra; Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Machine Workers* v. *Oxco Brush Div.*, 517 F. 2d 239, 242–243 (CA6 1975); *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181, 186 (CA2 1962), cert. denied, 374 U. S. 830 (1963). Nolde concedes as much by limiting its claim of nonarbitrability to those disputes which clearly arise after the contract's expiration. Brief for Petitioner 22.

Our holding in *John Wiley & Sons* is instructive on this matter. There we held that a dispute over employees' rights to severance pay[6] under an expired collective-bargaining agreement was arbitrable even though there was no longer any contract between the parties. In their expired agreement, the parties had agreed to submit to arbitration:

> " 'any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application or enforcement.' " 376 U. S., at 553.

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[6] The parties also disagreed over such matters as seniority rights, welfare security benefits, discharges and layoffs, and vacations. 376 U. S., at 554 n. 7.

The Court had little difficulty interpreting that language to require the arbitration of the Union's post-termination severance-pay claim since that claim was

> "based solely on the Union's construction of the . . . agreement in such a way that . . . [the Employer] would have been required to discharge certain obligations notwithstanding the expiration of the agreement." *Id.*, at 555.

We thus determined that the parties' obligations under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the expired agreement. It is true that the Union there first sought to arbitrate the question of post-contract severance pay while the agreement under which it claimed such benefits was still in effect. But that factor was not dispositive in our determination of arbitrability. Indeed, that very distinction was implicitly rejected shortly thereafter in *Piano Workers* v. *W. W. Kimball Co.*, 379 U. S. 357 (1964), rev'g 333 F. 2d 761 (CA7), on the basis of *John Wiley & Sons, supra*, and *Steelworkers* v. *American Mfg. Co., supra*.[7] We decline to depart from that course in the instant case, for, on the record before us, the fact that the Union asserted its claim to severance pay shortly after, rather than before, contract termination does not control the arbitrability of that claim.

The parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery established by their collective-bargaining agreement. The severance-pay dispute, as we have noted, would have been subject to resolution under those procedures had it arisen during the contract's term. However, even though the parties could have so pro-

[7] In *W. W. Kimball Co.*, the Seventh Circuit found that a dispute over seniority rights under an expired collective-bargaining agreement was nonarbitrable. There the dispute did not arise, nor were arbitration proceedings or an action to compel the same instituted, during the life of the agreement. 333 F. 2d, at 762–763.

vided, there is nothing in the arbitration clause that expressly excludes from its operation a dispute which arises under the contract, but which is based on events that occur after its termination. The contract's silence, of course, does not establish the parties' intent to resolve post-termination grievances by arbitration. But in the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract. Any other holding would permit the employer to cut off all arbitration of severance-pay claims by terminating an existing contract simultaneously with closing business operations.

By their contract the parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations under the collective-bargaining agreement. Their reasons for doing so, as well as the special role of arbitration in the employer-employee relationship, have long been recognized by this Court:

> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf Nav. Co.*, 363 U. S., at 582.

Indeed, it is because of his special experience, expertise, and selection by the parties that courts generally defer to an arbitrator's interpretation of the collective-bargaining agreement:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construc-

tion of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel & Car Corp.*, 363 U. S., at 599.

While the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind their decision to resolve their contractual differences through arbitration. The contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract. Nor would their interest in obtaining a prompt and inexpensive resolution of their disputes by an expert tribunal. Hence, there is little reason to construe this contract to mean that the parties intended their contractual duty to submit grievances and claims arising under the contract to terminate immediately on the termination of the contract; the alternative remedy of a lawsuit is the very remedy the arbitration clause was designed to avoid.

It is also noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements. Congress has expressly stated:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U. S. C. § 173 (d).

In order to effectuate this policy, this Court has established a strong presumption favoring arbitrability:

> "[T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the ma-

> chinery of arbitration. . . . [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf Nav. Co., supra,* at 582–583.

The parties must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.

We therefore agree with the conclusion of the Court of Appeals that, on this record, the Union's claim for severance pay under the expired collective-bargaining agreement is subject to resolution under the arbitration provisions of that contract.[8]

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

When a dispute arises between two parties, that dispute is to be settled by the process of arbitration only if there is an

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[8] Certiorari was neither sought, nor granted, on the question of the arbitrator's authority to consider arbitrability following referral, and we express no view on that matter. Similarly, we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration.

agreement between the parties that the dispute will be settled by that means. Yet the Court today says that a union-employer dispute must be settled by arbitration even though the dispute did not even arise until after the contract containing an agreement to arbitrate had been terminated by action of the Union, and the employer had closed its business. I think this conclusion is neither required by existing precedent nor based upon any realistic appraisal of the contracting parties' intent.

Our cases, to be sure, have established the importance of arbitration in resolving disputes arising under collective-bargaining agreements and in thereby maintaining peaceful labor relations. A collective-bargaining agreement erects a system of industrial self-government; grievance and arbitration provisions in such an agreement make that collective-bargaining process continuous: "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 581.

But the duty to arbitrate can arise only upon the parties' agreement to resolve their contractual differences in the arbitral forum. And the presumptive continuation of that duty even after the formal expiration of such an agreement can be justified only in terms of a web of assumptions about the continuing nature of the labor-management relationship and the importance of having available a method harmoniously to resolve differences arising in that relationship. See generally *id.*, at 578.

Those assumptions are wholly inapplicable to this case. The closing of the bakery by the employer-petitioner necessarily meant that there was no continuing relationship to protect or preserve. Cf. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543; *Howard Johnson Co.* v. *Hotel Employees*, 417

U. S. 249. And the Union's termination of the contract, thereby releasing it from its obligation not to strike, foreclosed any reason for implying a continuing duty on the part of the employer to arbitrate as a *quid pro quo* for the Union's offsetting, enforceable duty to negotiate rather than strike. See *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235.

Although for these reasons no continuing duty to arbitrate can be presumed in this case in the interest of maintaining industrial peace, it might nevertheless rationally be argued that the arbitration agreement was a term or condition of employment that the employer could not unilaterally change without first bargaining to impasse. See 29 U. S. C. § 158 (a) (5). The trouble with that argument is that the National Labor Relations Board has rejected the notion that arbitration is a term or condition of employment that by operation of statute continues even after the contract embodying it has terminated. The Board, instead, has viewed arbitration as an obligation that arises solely out of contract, and is favored but not statutorily required as a dispute-resolving mechanism. See *Hilton-Davis Chemical Co.*, 185 N. L. R. B. 241 (1970). See also *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368.

It is clear, therefore, that neither federal labor law nor the interest of maintaining industrial peace can serve to explain the Court's conclusion that the presumption of arbitrability extends to the facts of this case.

I realize that our decisions have broadly held that doubts as to arbitrability under an arbitration clause are to be resolved in favor of arbitrability. See *Warrior & Gulf Nav. Co., supra.* But those cases involved arbitration clauses that were undoubtedly in force at the time the dispute first arose, and arbitration was invoked to resolve issues arising during the continuing course of the employer-employee relationship. (See, *e. g., Piano Workers* v. *W. W. Kimball Co.*, 379 U. S. 357, where a dispute over the rights of employees to preferential hiring at a new plant commenced before the contract at

the old plant had expired.) The question here, by contrast, is whether the presumption of arbitrability survived even when the contract providing for arbitration had terminated and the rights in dispute, though claimed to arise under the contract, ripened only after the contract had expired and the employment relationship had terminated.

For the reasons I have expressed, I think there was no agreement to arbitrate this dispute. The Union had, of course, a clear cause of action under § 301 of the Labor Management Relations Act to seek judicial redress against the employer for its failure to meet its severance-pay obligations to the employees. The Union did, in fact, bring just such a lawsuit in this case. If the Court of Appeals had addressed the merits of the litigation, as I believe it should have done, this controversy would have been settled long ago.

I respectfully dissent from the opinion and judgment of the Court.

Syllabus

TOWN OF LOCKPORT, NEW YORK, ET AL. *v.* CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 75–1157. Argued November 30–December 1, 1976—Decided March 7, 1977

County government in New York has traditionally taken the form of a single-branch legislature, exercising general governmental powers, and such powers are also exercised by the county's constituent cities, villages, and towns. The allocation of powers among these subdivisions can be changed, and a new form of county government adopted, pursuant to referendum procedures provided by the New York Constitution and an implementing statute, under which a proposed county charter submitted to the voters for approval is adopted only if a majority of the voting city dwellers and a majority of the voting noncity dwellers both approve. After a proposed charter for Niagara County submitted to the voters pursuant to these procedures was defeated (despite the fact that a majority of those voting in the entire county favored it) when the city voters approved it but the noncity voters disapproved it, appellees, a group of Niagara County voters, brought suit in Federal District Court challenging the constitutionality of the procedures, and a three-judge court held that the concurrent-majority requirements violated the Equal Protection Clause of the Fourteenth Amendment. *Held:* The challenged provisions, which are entitled to a presumption of constitutionality, do not violate the Equal Protection Clause. The separate voter approval requirements are based on the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. Voters in these constituent units are directly and differentially affected by the restructuring of county government, which may make the provider of public services more remote and less subject to the voters' individual influence, and these differing interests of city and noncity voters in the adoption of a new county charter are sufficient under the Equal Protection Clause to justify the classifications made under the law. Pp. 268–273.

Reversed. See 386 F. Supp. 1.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C J., concurred in the judgment.

Victor T. Fuzak argued the cause and filed briefs for appellants.

John J. Phelan argued the cause and filed a brief for appellees Citizens for Community Action at the Local Level, Inc., et al. *Miles A. Lance* argued the cause for appellees Graf et al. With him on the brief was *John V. Simon.*

MR. JUSTICE STEWART delivered the opinion of the Court.

New York law provides that a new county charter will go into effect only if it is approved in a referendum election by separate majorities of the voters who live in the cities within the county, and of those who live outside the cities. A three-judge Federal District Court held that these requirements violate the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction of this direct appeal from the District Court's judgment under 28 U. S. C. § 1253. 426 U. S. 918.

I

County government in New York has traditionally taken the form of a single-branch legislature, exercising general governmental powers. General governmental powers are also exercised by the county's constituent cities, villages, and towns. The allocation of powers among these subdivisions can be changed, and a new form of county government adopted, pursuant to referendum procedures specified in Art. IX of the New York Constitution [1] and implemented by § 33

[1] Article IX, § 1 (h) (1), of the New York Constitution (McKinney 1969) provides in pertinent part:

"§ 1. Bill of rights for local governments

"Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local govern-

of the Municipal Home Rule Law.[2] Under those procedures a county board of supervisors may submit a proposed charter to the voters for approval. If a majority of the voting city

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ments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

. . . . . .

"(h)(1) Counties, other than those wholly included within a city, shall be empowered . . . to adopt, amend or repeal alternative forms of county government . . . . Any such form of government or any amendment thereof . . . may transfer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other . . . or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form of county government or any amendment thereof . . . provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit."

[2] Section 33 (7) of the Municipal Home Rule Law of New York (McKinney Supp. 1976–1977) provides:

"§ 33. Power to adopt, amend and repeal county charters

. . . . . .

"7. A charter law

"(a) providing a county charter, or

"(b) proposing an amendment or repeal of one or more provisions thereof which would have the effect of transferring a function or duty of the county, or of a city, town, village, district or other unit of local government wholly contained in the county, shall conform to and be subject to consideration by the board of supervisors in accordance with the provisions of this chapter generally applicable to the form of and action on proposed local laws by the board of supervisors. If a county charter, or a charter law as described in this subdivision, is adopted by the board of supervisors, it shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon (a) in the area of the county outside of

dwellers and a majority of the voting noncity dwellers both approve, the charter is adopted.[3]

In November 1972, a proposed charter for the county of Niagara was put to referendum. The charter created the new offices of County Executive and County Comptroller, and continued the county's existing power to establish tax rates, equalize assessments, issue bonds, maintain roads, and administer health and public welfare services. No explicit provision for redistribution of governmental powers from the cities or towns to the county government was made. The city voters approved the charter by a vote of 18,220 to 14,914. The noncity voters disapproved the charter by a vote of 11,594 to 10,665.[4] A majority of those voting in the entire county thus favored the charter.[5]

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cities and (b) in the area of the cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a county charter or charter law shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors. Such a county charter or charter law may provide for the separate submission to the electors at such election of one or more variations of the provisions of such county charter. Any such variation may include, but shall not be limited to, proposed transfers of functions of local government to other units of local government or a class or classes thereof."

[3] When the proposed charter provides for the transfer of duties or functions of villages within the county, the voters residing in the villages must also approve it by a separate majority. See nn. 1 and 2, *supra*. That requirement is not directly involved in the present litigation.

[4] Village residents are also residents of the towns in which they are located, are subject to their governments, and are included in the noncity vote.

[5] A total of 55,393 votes was cast; in the aggregate 28,885 voters favored the charter and 26,508 opposed it. The population of Niagara County was approximately 236,000.

The appellees, a group of Niagara County voters, filed suit pursuant to 42 U. S. C. § 1983 in the United States District Court for the Western District of New York, seeking a declaration that the New York constitutional and statutory provisions governing adoption of the charter form of county government are unconstitutional, and an order directing the appropriate New York officials to file the Niagara County charter as a duly enacted local law. A three-judge court was convened. Before its decision was announced, however, another new charter was put to referendum in Niagara County in November 1974. Again a majority of the city dwellers who voted approved the charter, a majority of the noncity voters disapproved it, and an aggregate majority of all those in the county who voted approved it.[6] The District Court subsequently found the concurrent-majority requirements of the New York Constitution and the New York Municipal Home Rule Law violative of the Equal Protection Clause of the Fourteenth Amendment, and ordered implementation of the 1972 Charter. 386 F. Supp. 1.[7] On appeal this Court vacated that judgment and remanded the cause "for reconsideration in light of the provisions of [the] new charter adopted by Niagara County in 1974." 423 U. S. 808. In subsequent proceedings on remand, the District Court found that there was "no substantial difference between the

[6] A total of 36,808 votes was cast in the referendum election. The city dwellers who voted favored the charter by a margin of 11,305 to 9,222; the noncity dwellers voted 8,222 to 8,059 against it. In the county as a whole, 19,364 voted for the charter, and 17,444 against it.

[7] Niagara County itself had earlier brought an action in the same court to enforce the 1972 Charter as the law of Niagara County. *County of Niagara* v. *New York*, Civ. No. 1972–656 (WDNY, Apr. 13, 1973). The District Court had dismissed the complaint on the ground that it presented no substantial federal question, and no appeal had been taken. The appellants interposed a res judicata defense based upon that judgment. The District Court properly rejected that defense upon the ground that the plaintiffs had not been parties to the earlier suit and were not in privity with the county of Niagara, which had brought it. 386 F. Supp., at 5.

two Charters" and that the 1974 County Charter had superseded the 1972 Charter.[8] Pursuant to its previous constitutional adjudication, the court decreed that the 1974 Charter "is in full force and effect as the instrument defining the form of local government for Niagara County." [9]

II

The impact of the Equal Protection Clause on the exercise of the electoral franchise under state law is hardly a novel concern of the federal judiciary. It was made clear more than 15 years ago in *Baker* v. *Carr*, 369 U. S. 186, that the subject is a justiciable one, and ever since the seminal case of *Reynolds* v. *Sims*, 377 U. S. 533, it has been established that the Equal Protection Clause cannot tolerate the disparity in individual voting strength that results when elected officials represent districts of unequal population, since "the funda-

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[8] The District Court also enjoined pending state proceedings brought by the appellants to challenge the certification and enforcement of the 1974 Charter. The appellants now argue that the District Court should have deferred to the jurisdiction of the state court. Even assuming that *Younger* v. *Harris*, 401 U. S. 37, principles are fully applicable in the civil context, however, the original action challenging the dual-majority provisions of New York law had been brought in the federal court well before the appellants filed their state-court suit, and principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court.

[9] The District Court's opinion on remand is unreported. The appellants argue that the relief originally sought in this suit was limited to the 1972 Charter, and that the case is now moot because the 1974 Charter has superseded it. Pursuant to our mandate on remand, however, the District Court gave full consideration to the 1974 Charter, concluded that it was substantially the same as the 1972 Charter, and amended its judgment to recognize the validity of the 1974 Charter. Although the better practice might have been to require amendment of the complaint so as formally to seek the relief ultimately granted, the appellants were not prejudiced by the procedure adopted by the District Court, and we consider the validity of the 1974 Charter as the issue before us.

mental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id.*, at 560–561.[10]

In the case before us the District Court, though recognizing that "the precise issue here presented appears to be one of first impression," concluded that the rule of *Reynolds* v. *Sims*, controlled its resolution. "Reasoning by analogy," the court held, in short, that the dual-majority requirement of New York law "is unconstitutional because it violates the one man, one vote principle." 386 F. Supp., at 7. In assessing the correctness of the District Court's judgment it is thus appropriate to begin by recalling the basic rationale of the decisions of this Court in which that principle was first developed and applied.

The rationale is, at bottom, so simple as to be almost self-evident. Beginning with *Reynolds* v. *Sims, supra,* cases in which the principle emerged involved challenges to state legislative apportionment systems that gave "the same number of representatives to unequal numbers of constituents." 377 U. S., at 563. The Court concluded that in voting for their legislators, all citizens have an equal interest in representative democracy, and that the concept of equal protection therefore requires that their votes be given equal weight.[11] See, *e. g., Lucas* v. *Colorado Gen. Assembly,* 377 U. S. 713; *Fortson* v. *Dorsey,* 379 U. S. 433; *Burns* v. *Richardson,* 384

[10] In the application of this settled rule, the Court has, of course, frequently been divided with respect to what deviations from numerical exactitude are constitutionally permissible. See, *e. g., Abate* v. *Mundt,* 403 U. S. 182; *Mahan* v. *Howell,* 410 U. S. 315; *Gaffney* v. *Cummings,* 412 U. S. 735; *White* v. *Regester,* 412 U. S. 755.

[11] The Court has applied the principle of "one person, one vote" to representative elections at the local as well as state level. See, *e. g., Avery* v. *Midland County,* 390 U. S. 474; *Hadley* v. *Junior College Dist.,* 397 U. S. 50.

U. S. 73; *Swann* v. *Adams*, 385 U. S. 440; *Kilgarlin* v. *Hill*, 386 U. S. 120; *Whitcomb* v. *Chavis*, 403 U. S. 124; *Gaffney* v. *Cummings*, 412 U. S. 735.

The equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance, however, in analyzing the propriety of recognizing distinctive voter interests in a "single-shot" referendum. In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. The policy impact of a referendum is also different in kind from the impact of choosing representatives—instead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters. That issue is capable, at least, of being analyzed to determine whether its adoption or rejection will have a disproportionate impact on an identifiable group of voters. If it is found to have such a disproportionate impact, the question then is whether a State can recognize that impact either by limiting the franchise to those voters specially affected or by giving their votes a special weight. This question has been confronted by the Court in two types of cases: those dealing with elections involving "special-interest" governmental bodies of limited jurisdiction, and those dealing with bond referenda.

The Court has held that the electorate of a special-purpose unit of government, such as a water storage district, may be apportioned to give greater influence to the constituent groups found to be most affected by the governmental unit's functions. *Salyer Land Co.* v. *Tulare Water Dist.*, 410 U. S. 719. But the classification of voters into "interested" and "noninterested" groups must still be reasonably precise, as *Kramer* v. *Union School Dist.*, 395 U. S. 621, demonstrates. The Court assumed in that case that the voting constituency in school district elections could be limited to those "primarily inter-

ested in school affairs," *id.*, at 632, but concluded that the State's classification of voters on the asserted basis of that interest was so imprecise that the exclusion of otherwise qualified voters was impermissible.[12]

In the bond referenda cases, the local government had either limited the electoral franchise to property owners, or weighted property owners' votes more heavily than those of nonproperty owners by using a "dual box" separate-majority approval system quite similar to the one at issue in the present case. *Cipriano* v. *City of Houma*, 395 U. S. 701; *Phoenix* v. *Kolodziejski*, 399 U. S. 204; *Hill* v. *Stone*, 421 U. S. 289.

In the *Cipriano* case, involving revenue bonds, it was apparent that all voters had an identity of interest in passage of the bond issue, and limitation of the electoral franchise to "property taxpayers" was, plainly, invidiously discriminatory. The other two cases, however, involved general obligation bonds. There, as in *Salyer* and *Kramer*, the validity of the classification depended upon whether the group interests were sufficiently different to justify total or partial withholding of the electoral franchise from one of them. In support of the classifications, it was argued that property owners have a more substantial stake in the adoption of obligation bonds than do nonproperty owners, because the taxes of the former directly and substantially fund the bond obligation. The Court rejected that argument for limiting the electoral franchise, however, noting that nonproperty owners also share in the tax burden when the tax on rental property or commercial businesses is passed on in the form of higher prices. Although the interests of the two groups are concededly not

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[12] See also *Carrington* v. *Rash*, 380 U. S. 89, holding that although the requirement that a citizen be a resident of Texas was clearly an acceptable means of defining relevant constituencies, Texas could not exclude all servicemen from voting on the conclusive presumption that their necessarily transient status precluded them from being bona fide residents.

identical, the Court held that they are sufficiently similar to prevent a state government from distinguishing between them by artificially narrowing or weighting the electoral franchise in favor of the property taxpayers.[13]

These decisions do not resolve the issues in the present case. Taken together, however, they can be said to focus attention on two inquiries: whether there is a genuine difference in the relevant interests of the groups that the state electoral classification has created; and, if so, whether any resulting enhancement of minority voting strength nonetheless amounts to invidious discrimination in violation of the Equal Protection Clause.

III

The argument that the provisions of New York law in question here are unconstitutional rests primarily on the premise that all voters in a New York county have identical interests in the adoption or rejection of a new charter, and that any distinction, therefore, between voters drawn on the basis of residence and working to the detriment of an identifiable class is an invidious discrimination. If the major premise were demonstrably correct—if it were clear that all voters in Niagara County have substantially identical interests in the adoption of a new county charter, regardless of where they reside within the county—the District Court's judgment would have to be affirmed under our prior cases. *Cipriano* v. *City of Houma, supra.* That major premise, however, simply cannot be accepted. To the contrary, it appears that the challenged provisions of New York law rest on the State's identification of the distinctive interests of the residents of

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[13] We have held, however, that a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class. *Gordon* v. *Lance,* 403 U. S. 1. Cf. *Hunter* v. *Erickson,* 393 U. S. 385.

the cities and towns within a county rather than their interests as residents of the county as a homogeneous unit. This identification is based in the realities of the distribution of governmental powers in New York, and is consistent with our cases that recognize both the wide discretion the States have in forming and allocating governmental tasks to local subdivisions, and the discrete interests that such local governmental units may have *qua* units. *Reynolds* v. *Sims*, 377 U. S., at 580; *Abate* v. *Mundt*, 403 U. S. 182; *Mahan* v. *Howell*, 410 U. S. 315.

General-purpose local government in New York is entrusted to four different units: counties, cities, towns, and villages. The State is divided into 62 counties; each of the 57 counties outside of New York City is divided into towns, or towns and one or more cities. Villages, once formed, are still part of the towns in which they are located. The New York Legislature has conferred home rule and general governmental powers on all of these subdivisions, and their governmental activities may on occasion substantially overlap.[14] The cities often perform functions within their jurisdiction that the county may perform for noncity residents; similarly villages perform some functions for their residents that the town provides for the rest of the town's inhabitants. Historically towns provided their areas with major social services that more recently have been transferred to counties; towns exercise more regulatory power than counties; and both towns and counties can create special taxing and improvement districts to administer services. See 13 New York Temporary State Commission on the Constitutional Convention, Local Government 20 (1967).

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[14] See generally N. Y. Mun. Home Rule Law (McKinney 1969 and Supp. 1976–1977); 13 New York Temporary State Commission on the Constitutional Convention, Local Government (1967); Moore, Early History of Town Government in New York State, in N. Y. Town Law vii (McKinney 1965).

Acting within a fairly loose state apportionment of political power, the relative energy and organization of these various subdivisions will often determine which one of them in a given area carries out the major tasks of local government. Since the cities have the greatest autonomy within this scheme, changes serving to strengthen the county structure may have the most immediate impact on the functions of the towns as deliverers of government services. *Id.*, at 19.[15]

The provisions of New York law here in question clearly contemplate that a new or amended county charter will frequently operate to transfer "functions or duties" from the towns or cities to the county, or even to "abolish one or more offices, departments, agencies or units of government." [16] Although the 1974 Charter does not explicitly transfer governmental functions or duties from the towns to Niagara County, the executive-legislative form of government it provides would significantly enhance the county's organizational and service delivery capacity, for the purpose of "greater efficiency and responsibility in county government." Niagara County Charter, 1972. The creation of the offices of County Executive and Commissioner of Finance clearly reflects this purpose. Such anticipated organizational changes, no less than explicit transfers of functions, could effectively shift any pre-existing balance of power between town and county governments toward county predominance.[17] In terms of efficient delivery

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[15] The Court has previously had occasion to recognize the historic functional interdependence of county and town subdivisions in New York, and has allowed considerable deviation from the basic rule of *Reynolds* v. *Sims*, 377 U. S. 533, on that ground. *Abate* v. *Mundt*, 403 U. S. 182.

[16] See nn. 1 and 2, *supra*.

[17] Appellee Citizens for Community Action at the Local Level argue that appellee Niagara County's failure to controvert the allegation in the original complaint that "no specific group of voters, residents or other persons were primarily affected or interested as compared to another group" establishes that the city and town voters here had identical interests

of government services, such a shift might be all to the good, but it may still be viewed as carrying a cost quite different for town voters and their existing town governments from that incurred by city voters and their existing city governments.

The ultimate question then is whether, given the differing interests of city and noncity voters in the adoption of a new county charter in New York, those differences are sufficient under the Equal Protection Clause to justify the classifications made by New York law. *Phoenix* v. *Kolodziejski*, 399 U. S. 204; *Salyer Land Co.* v. *Tulare Water Dist.*, 410 U. S. 719; *Hill* v. *Stone*, 421 U. S. 289. If that question were posed in the context of annexation proceedings, the fact that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests could be readily perceived. The fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation. Cf. *Hunter* v. *Pittsburgh*, 207 U. S. 161. Similarly a proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district.

Yet in terms of recognizing constituencies with separate and potentially opposing interests, the structural decision to annex or consolidate is similar in impact to the decision to restructure county government in New York. In each case, separate voter approval requirements are based on

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in the charter's adoption. As a factual matter, this assertion appears contradicted by the later intervention of the town of Lockport to protect its voters' special interests in the issue. In any case, the question of the constitutionality of Art. IX of the New York Constitution and § 33 of the New York Municipal Home Rule Law turns, not on the perceptions of voters in a particular county, but on whether the State might legitimately view their interests as sufficiently different to justify a distinction between city and town voters.

the perception that the real and long-term impact of a restructuring of local government is felt quite differently by the different county constituent units that in a sense compete to provide similar governmental services. Voters in these constituent units are directly and differentially affected by the restructuring of county government, which may make the provider of public services more remote and less subject to the voters' individual influence.

The provisions of New York law here in question no more than recognize the realities of these substantially differing electoral interests.[18] Granting to these provisions the presumption of constitutionality to which every duly enacted state and federal law is entitled,[19] we are unable to

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[18] There is no indication that the classifications created by New York law work to favor city voter over town voter, or town voter over city voter. In some New York counties, city voters outnumber town voters; in other counties, the reverse is true. We are advised that of charters proposed in 14 counties, one failed to obtain majority approval of the city voters; two (including Niagara County) failed to obtain majority approval of noncity voters; eight failed to obtain a majority vote in either the towns or the cities; and three were approved by both city and town voters.

The constitutional and statutory provisions in this case also do not appear to be the sustained product of either an entrenched minority or a willful majority. Instead they have been subject historically to fairly frequent revision. The constitutional amendment requiring city and town voter approval for changes in county government was first adopted by referendum in 1935. N. Y. Const., Art. III, § 26 (1935). In 1938, the Constitution was amended to provide for approval by the voters in the county as a whole, unless the proposal provided for transfers of functions to or from cities, towns, or villages in the county. N. Y. Const., Art. IX (1938). In 1958, Art. IX was again amended to provide that any change in county government had to be approved by a majority of the noncity voters, voting as a group, and by a majority of the city voters, voting as a group. The existing Art. IX, adopted in 1963, contains the same general provision as the 1958 amendment.

[19] See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

conclude that they violate the Equal Protection Clause of the Fourteenth Amendment.

For the reasons stated in this opinion the judgment is reversed.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

COMPLETE AUTO TRANSIT, INC. *v.* BRADY, CHAIRMAN, MISSISSIPPI TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 76-29. Argued January 19, 1977—Decided March 7, 1977

A Mississippi tax on the privilege of doing business in the State *held* not to violate the Commerce Clause when it is applied to an interstate activity (here the transportation by motor carrier in Mississippi to Mississippi dealers of cars manufactured outside the State) with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, overruled. Pp. 279–289.

330 So. 2d 268, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Alan W. Perry argued the cause for appellant. With him on the briefs were *Robert C. Cannada, George H. Butler, D. Carl Black,* and *Rhesa H. Barksdale.*

James H. Haddock argued the cause and filed a brief for appellee.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Once again we are presented with " 'the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities' related to a corporation's operation of an interstate business." *Colonial Pipeline Co.* v. *Traigle*, 421 U. S. 100, 101 (1975), quoting *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, 85 (1948). The issue in this case is whether Mississippi runs afoul of the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, when it applies the tax it imposes on "the privilege of . . . doing business" within the State to appellant's activity in interstate commerce. The Supreme Court of Mississippi unanimously sustained the tax against

appellant's constitutional challenge. 330 So. 2d 268 (1976). We noted probable jurisdiction in order to consider anew the applicable principles in this troublesome area. 429 U. S. 813 (1976).

I

The taxes in question are sales taxes assessed by the Mississippi State Tax Commission against the appellant, Complete Auto Transit, Inc., for the period from August 1, 1968, through July 31, 1972. The assessments were made pursuant to the following Mississippi statutes:

> "There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections." Miss. Code Ann., 1942, § 10105 (1972 Supp.), as amended.[1]
>
> "Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business . . . ." § 10109 (2), as amended.[2]

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[1] The statute is now § 27-65-13 of the State's 1972 Code.

[2] This statute is now § 27-65-19 (2) of the 1972 Code. It was amended, effective August 1, 1972, to exclude the transportation of property. 1972 Miss. Laws, c. 506, § 2.

Section 10109, as codified in 1942, imposed a tax on gross income from all transportation, with gross income defined to exclude "so much thereof as is derived from business conducted in commerce between this State and other States of the United States . . . which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America." In 1955, this exclusionary language was eliminated and the statute was amended to cover only transportation "between points within

Any person liable for the tax is required to add it to the gross sales price and, "insofar as practicable," to collect it at the time the sales price is collected. § 10117, as amended.[3]

Appellant is a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. General Motors assembles outside Mississippi vehicles that are destined for dealers within the State. The vehicles are then shipped by rail to Jackson, Miss., where, usually within 48 hours, they are loaded onto appellant's trucks and transported by appellant to the Mississippi dealers. App. 47–48, 78–79, 86–87. Appellant is paid on a contract basis for the transportation from the railhead to the dealers.[4] *Id.*, at 50–51, 68.

By letter dated October 5, 1971, the Mississippi Tax Com-

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this state." 1955 Miss. Laws, c. 109, § 10. The amendment gave the statute essentially the form it possessed during the period relevant here.

It might be argued that the statute as so amended evinces an intent to reach only intrastate commerce, and that it should be so construed. Appellant, however, does not make that argument, and the Supreme Court of Mississippi clearly viewed that statute as applying to both intrastate commerce and interstate commerce.

We are advised by the appellee that the tax has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State. Tr. of Oral Arg. 34–35, 38.

[3] This statute is now § 27–65–31 of the 1972 Code. Violation of the requirements of the section is a misdemeanor. *Ibid.*

[4] The parties understandably go to great pains to describe the details of the bills of lading, and the responsibility of various entities for the vehicles as they travel from the assembly plant to the dealers. Appellant seeks to demonstrate that the transportation it provides from the railhead to the dealers is part of a movement in interstate commerce. Appellee argues that appellant's transportation is intrastate business, but further argues that even if the activity is part of interstate commerce, the tax is not unconstitutional. Brief for Appellant 11–14; Brief for Appellee 12–24; Reply Brief for Appellant 14–16. The Mississippi courts, in upholding the tax, assumed that the transportation is in interstate commerce. For present purposes, we make the same assumption.

mission informed appellant that it was being assessed taxes and interest totaling $122,160.59 for the sales of transportation services during the three-year period from August 1, 1968, through July 31, 1971.[5] Remittance within 10 days was requested. *Id.*, at 9–10. By similar letter dated December 28, 1972, the Commission advised appellant of an assessment of $42,990.89 for the period from August 1, 1971, through July 31, 1972. *Id.*, at 11–12. Appellant paid the assessments under protest and, in April 1973, pursuant to § 10121.1, as amended, of the 1942 Code (now § 27–65–47 of the 1972 Code), instituted the present refund action in the Chancery Court of the First Judicial District of Hinds County.

Appellant claimed that its transportation was but one part of an interstate movement, and that the taxes assessed and paid were unconstitutional as applied to operations in interstate commerce. App. 4, 6–7. The Chancery Court, in an unreported opinion, sustained the assessments. *Id.*, at 99–102.

The Mississippi Supreme Court affirmed. It concluded:

> "It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case." 330 So. 2d, at 272.

Appellant, in its complaint in Chancery Court, did *not* allege that its activity which Mississippi taxes does not have a

[5] Although appellant had been operating in Mississippi since 1960, App. 77, the state audit and assessment covered only the period beginning August 1, 1968. *Id.*, at 37–38. No effort had been made to apply the tax to appellant for any period prior to that date.

sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State.[6] No such claims were made before the Mississippi Supreme Court, and although appellant argues here that a tax on "the privilege of engaging in interstate commerce" creates an unacceptable risk of discrimination and undue burdens, Brief for Appellant 20–27, it does not claim that discrimination or undue burdens exist in fact.

Appellant's attack is based solely on decisions of this Court holding that a tax on the "privilege" of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce. See, *e. g.*, *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951); *Freeman* v. *Hewit*, 329 U. S. 249 (1946). This rule looks only to the fact that the incidence of the tax is the "privilege of doing business"; it deems irrelevant any consideration of the practical effect of the tax. The rule reflects an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from state taxation.[7]

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[6] See *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977); *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964); *Illinois Cent. R. Co.* v. *Minnesota*, 309 U. S. 157 (1940); *Ingels* v. *Morf*, 300 U. S. 290 (1937). See also *Standard Steel Co.* v. *Washington Rev. Dept.*, 419 U. S. 560 (1975), and *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939).

[7] The Court summarized the "free trade" view in *Freeman* v. *Hewit*, 329 U. S., at 252:

"[T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance."

Appellee, in its turn, relies on decisions of this Court stating that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business," *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938). These decisions[8] have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.

Over the years, the Court has applied this practical analysis in approving many types of tax that avoided running afoul of the prohibition against taxing the "privilege of doing business," but in each instance it has refused to overrule the prohibition. Under the present state of the law, the *Spector* rule, as it has come to be known, has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman.

II

The modern origin of the *Spector* rule may be found in *Freeman* v. *Hewit, supra.*[9] At issue in *Freeman* was the ap-

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[8] See, *e. g., General Motors Corp.* v. *Washington, supra; Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959); *Memphis Gas Co.* v. *Stone*, 335 U. S. 80 (1948); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

[9] Although we mention *Freeman* as the starting point, elements of the views expressed therein, and the positions that underlie that debate, were evident in prior opinions. Compare *State Tax on Railway Gross Receipts*, 15 Wall. 284 (1873), with *Fargo* v. *Michigan*, 121 U. S. 230 (1887); and compare *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927), and *Cooney* v. *Mountain States Tel. Co.*, 294 U. S. 384 (1935), with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See generally P. Hartman, State Taxation of Interstate Commerce (1953); Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What

plication of an Indiana tax upon "the receipt of the entire gross income" of residents and domiciliaries. 329 U. S., at 250. Indiana sought to impose this tax on income generated when a trustee of an Indiana estate instructed his local stockbroker to sell certain securities. The broker arranged with correspondents in New York to sell the securities on the New York Stock Exchange. The securities were sold, and the New York brokers, after deducting expenses and commission, transmitted the proceeds to the Indiana broker who in turn delivered them, less his commission, to the trustee. The Indiana Supreme Court sustained the tax, but this Court reversed.

Mr. Justice Frankfurter, speaking for five Members of the Court, announced a blanket prohibition against any state taxation imposed directly on an interstate transaction. He explicitly deemed unnecessary to the decision of the case any showing of discrimination against interstate commerce or error in apportionment of the tax. *Id.*, at 254, 256–257. He recognized that a State could constitutionally tax local manufacture, impose license taxes on corporations doing business in the State, tax property within the State, and tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *Id.*, at 255. Nevertheless, a direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional *per se*.

Mr. Justice Rutledge, in a lengthy concurring opinion, argued that the tax should be judged by its economic effects rather than by its formal phrasing. After reviewing the Court's prior decisions, he concluded: "The fact is that 'direct incidence' of a state tax or regulation . . . has long since been discarded as being in itself sufficient to outlaw state legislation." *Id.*, at 265–266. In his view, a state tax is unconsti-

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Have You?, 4 Vand. L. Rev. 496 (1951), and writings cited therein at 496 n. 1; Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Colum. L. Rev. 211 (1947).

tutional only if the activity lacks the necessary connection with the taxing state to give "jurisdiction to tax," *id.*, at 271, or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation. *Id.*, at 276–277.[10]

The rule announced in *Freeman* was viewed in the commentary as a triumph of formalism over substance, providing little guidance even as to formal requirements. See P. Hartman, State Taxation of Interstate Commerce 200–204 (1953); Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Colum. L. Rev. 211 (1947). Although the rule might have been utilized as the keystone of a movement toward absolute immunity of interstate commerce from state taxation,[11] the Court consistently has indicated that "interstate commerce may be made to pay its way," and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.

The narrowing of the rule to one of draftsmanship and phraseology began with another Mississippi case, *Memphis Gas Co.* v. *Stone*, 335 U. S. 80 (1948). Memphis Natural Gas Company owned and operated a pipeline running from Louisiana to Memphis. Approximately 135 miles of the line were in Mississippi. Mississippi imposed a "franchise or excise" tax measured by "the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by [a corporation] within this state." Miss. Code Ann., 1942, § 9313. The Mississippi Supreme Court upheld the tax, and this Court affirmed.

In an opinion for himself and two others, Mr. Justice Reed

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[10] Mr. Justice Rutledge agreed with the result the Court reached in *Freeman* because of his belief that the apportionment problem was best solved if States other than the market State were forbidden to impose unapportioned gross receipts taxes of the kind Indiana sought to exact.

[11] A consistent application of the doctrine of immunity for interstate commerce, of course, would have necessitated overruling the cases approved by the *Freeman* Court that upheld taxes whose burden, although indirect, fell on interstate commerce.

noted that the tax was not discriminatory, that there was no possibility of multiple taxation, that the amount of the tax was reasonable, and that the tax was properly apportioned to the investment in Mississippi. 335 U. S., at 87–88. He then went on to consider whether the tax was "upon the privilege of doing interstate business within the state." *Id.*, at 88. He drew a distinction between a tax on "the privilege of doing interstate business" and a tax on "the privilege of exercising corporate functions within the State," and held that while the former is unconstitutional, the latter is not barred by the Commerce Clause. *Id.*, at 88–93. He then approved the tax there at issue because

> "there is no attempt to tax the privilege of doing an interstate business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities.'" *Id.*, at 93.

Mr. Justice Black concurred in the judgment without opinion. *Id.*, at 96. Mr. Justice Rutledge provided the fifth vote, stating in his concurrence:

> "[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state." *Id.*, at 96–97 (footnotes omitted).

Four Justices dissented, *id.*, at 99, on the grounds that it had not been shown that the State afforded any protection in

return for the tax,[12] and that, therefore, the tax must be viewed as one on the "privilege" of engaging in interstate commerce. The dissenters recognized that an identical effect could be achieved by an increase in the ad valorem property tax, *id.*, at 104, but would have held, notwithstanding, that a tax on the "privilege" is unconstitutional.

The prohibition against state taxation of the "privilege" of engaging in commerce that is interstate was reaffirmed in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951), a case similar on its facts to the instant case. The taxpayer there was a Missouri corporation engaged exclusively in interstate trucking. Some of its shipments originated or terminated in Connecticut. Connecticut imposed on a corporation a "tax or excise upon its franchise for the privilege of carrying on or doing business within the state," measured by apportioned net income. *Id.*, at 603–604, n. 1. Spector brought suit in federal court to enjoin collection of the tax as applied to its activities. The District Court issued the injunction. The Second Circuit reversed. This Court, with three Justices in dissent, in turn reversed the Court of Appeals and held the tax unconstitutional as applied.

The Court recognized that "where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both in-

[12] In arriving at this conclusion, the dissent relied upon a construction of a stipulation entered into by the parties, 335 U. S., at 100–101, and upon an independent review of the record. The plurality rejected the dissent's reading of the stipulation and noted, in addition, that the question presented in the petition for certiorari did not raise a claim that the State was providing no service for which it could ask recompense. *Id.*, at 83–84. The plurality then relied on the Supreme Court of Mississippi's holding that the State did provide protection that could properly be the subject of a tax.

terstate and intrastate." *Id.*, at 609–610 (footnote omitted). It held, nevertheless, that a tax on the "privilege" of doing business is unconstitutional if applied against what is exclusively interstate commerce. The dissenters argued, on the other hand, *id.*, at 610, that there is no constitutional difference between an "exclusively interstate" business and a "mixed" business, and that a fairly apportioned and nondiscriminatory tax on either type is not prohibited by the Commerce Clause.

The *Spector* rule was applied in *Railway Express Agency* v. *Virginia*, 347 U. S. 359 (1954) (*Railway Express I*), to declare unconstitutional a State's "annual license tax" levied on gross receipts for the "privilege of doing business in this State." The Court, by a 5-to-4 vote, held that the tax on gross receipts was a tax on the privilege of doing business rather than a tax on property in the State, as Virginia contended.

Virginia thereupon revised the wording of its statute to impose a "franchise tax" on "intangible property" in the form of "going concern" value as measured by gross receipts. The tax was again asserted against the Agency which in Virginia was engaged exclusively in interstate commerce. This Court's opinion, buttressed by two concurring opinions and one concurrence in the result, upheld the reworded statute as not violative of the *Spector* rule. *Railway Express Agency* v. *Virginia*, 358 U. S. 434 (1959) (*Railway Express II*). In upholding the statute, the Court's opinion recognized that the rule against taxing the "privilege" of doing interstate business had created a situation where "the use of magic words or labels" could "disable an otherwise constitutional levy." *Id.*, at 441.

There was no real economic difference between the statutes in *Railway Express I* and *Railway Express II*. The Court long since had recognized that interstate commerce may be made to pay its way. Yet under the *Spector* rule, the economic realities in *Railway Express I* became irrelevant. The

Spector rule had come to operate only as a rule of draftsmanship, and served only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause.

On the day it announced *Railway Express II*, the Court further confirmed that a State, with proper drafting, may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause. In *Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), the Court held that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the tax. Limited in that way, the tax could be levied even though the income was generated exclusively by interstate sales. *Spector* was distinguished, briefly and in passing, as a case in which "the incidence" of the tax "was the privilege of doing business." 358 U. S., at 464.

Thus, applying the rule of *Northwestern Cement* to the facts of *Spector*, it is clear that Connecticut could have taxed the apportioned net income derived from the exclusively interstate commerce. It could not, however, tax the "privilege" of doing business as measured by the apportioned net income. The reason for attaching constitutional significance to a semantic difference is difficult to discern.

The unsatisfactory operation of the *Spector* rule is well demonstrated by our recent case of *Colonial Pipeline Co.* v. *Traigle*, 421 U. S. 100 (1975). Colonial was a Delaware corporation with an interstate pipeline running through Louisiana for approximately 258 miles. It maintained a work force and pumping stations in Louisiana to keep the pipeline flowing, but it did no intrastate business in that State. *Id.*, at 101–102. In 1962, Louisiana imposed on Colonial a franchise tax for "the privilege of carrying on or doing business" in the State. The Louisiana Court of Appeal invalidated the

tax as violative of the rule of *Spector*. *Colonial Pipeline Co.* v. *Mouton*, 228 So. 2d 718 (1969). The Supreme Court of Louisiana refused review. 255 La. 474, 231 So. 2d 393 (1970). The Louisiana Legislature, perhaps recognizing that it had run afoul of a rule of words rather than a rule of substance, then redrafted the statute to levy the tax, as an alternative incident, on the "qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form." Again, the Court of Appeal held the tax unconstitutional as applied to the appellant. *Colonial Pipeline Co.* v. *Agerton*, 275 So. 2d 834 (1973). But this time the Louisiana Supreme Court upheld the new tax. 289 So. 2d 93 (1974)

By a 7-to-1 vote, this Court affirmed. No question had been raised as to the propriety of the apportionment of the tax, and no claim was made that the tax was discriminatory. 421 U. S., at 101. The Court noted that the tax was imposed on that aspect of interstate commerce to which the State bore a special relation, and that the State bestowed powers, privileges, and benefits sufficient to support a tax on doing business in the corporate form in Louisiana. *Id.*, at 109. Accordingly, on the authority of *Memphis Gas*, the tax was held to be constitutional. The Court distinguished *Spector* on the familiar ground that it involved a tax on the privilege of carrying on interstate commerce, while the Louisiana Legislature, in contrast, had worded the statute at issue "narrowly to confine the impost to one related to appellant's activities within the State in the corporate form." 421 U. S., at 113–114.[13]

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[13] Five Members of the Court joined in the opinion distinguishing *Spector*. Two concurred in the judgment, but viewed *Spector* as indistinguishable and would have overruled it. 421 U. S., at 114–116. One also viewed *Spector* as indistinguishable, but felt that it was an established precedent until forthrightly overruled. *Id.*, at 116. Mr. Justice Douglas took no part.

While refraining from overruling *Spector*, the Court noted:

> "[D]ecisions of this Court, particularly during recent decades, have sustained nondiscriminatory, properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return." *Id.*, at 108.

One commentator concluded: "After reading *Colonial*, only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing interstate business is immune from state taxation." Hellerstein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: *Standard Pressed Steel* and *Colonial Pipeline*, 62 Va. L. Rev. 149, 188 (1976).[14]

III

In this case, of course, we are confronted with a situation like that presented in *Spector*. The tax is labeled a privilege tax "for the privilege of . . . doing business" in Mississippi, § 10105 of the State's 1942 Code, as amended, and the activity taxed is, or has been assumed to be, interstate commerce. We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned.

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[14] Less charitably put: "In light of the expanding scope of the state taxing power over interstate commerce, *Spector* is an anachronism. . . . Continued adherence to *Spector*, especially after *Northwestern States Portland Cement*, cannot be justified." Comment, Pipelines, Privileges and Labels: Colonial Pipeline Co. v. Traigle, 70 Nw. U. L. Rev. 835, 854 (1975).

The view of the Commerce Clause that gave rise to the rule of *Spector* perhaps was not without some substance. Nonetheless, the possibility of defending it in the abstract does not alter the fact that the Court has rejected the proposition that interstate commerce is immune from state taxation:

> "It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938)." *Colonial Pipeline Co.* v. *Traigle*, 421 U. S., at 108.

Not only has the philosophy underlying the rule been rejected, but the rule itself has been stripped of any practical significance. If Mississippi had called its tax one on "net income" or on the "going concern value" of appellant's business, the *Spector* rule could not invalidate it. There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned.[15] Accordingly, we now reject the rule of

[15] It might be argued that "privilege" taxes, by focusing on the doing of business, are easily tailored to single out interstate businesses and subject them to effects forbidden by the Commerce Clause, and that, therefore, "privilege" taxes should be subjected to a *per se* rule against their imposition on interstate business. Yet property taxes also may be tailored to differentiate between property used in transportation and other types of property, see *Railway Express II*, 358 U. S. 434 (1959); an income tax could use different rates for different types of business; and a tax on the "privilege of doing business in corporate form" could be made to change with the nature of the corporate activity involved. Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimina-

Spector Motor Service, Inc. v. *O'Connor*, that a state tax on the "privilege of doing business" is *per se* unconstitutional when it is applied to interstate commerce, and that case is overruled.

There being no objection to Mississippi's tax on appellant except that it was imposed on nothing other than the "privilege of doing business" that is interstate, the judgment of the Supreme Court of Mississippi is affirmed.

It is so ordered.

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tion against interstate commerce, and of a lack of relationship to the services provided by the State. See *Freeman* v. *Hewit*, 329 U. S., at 265–266, n. 13 (concurring opinion). A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce. We perceive no reason, however, why a tax on the "privilege of doing business" should be viewed as creating a qualitatively different danger so as to require a *per se* rule of unconstitutionality.

It might also be argued that adoption of a rule of absolute immunity for interstate commerce (a rule that would, of course, go beyond *Spector*) would relieve this Court of difficult judgments that on occasion will have to be made. We believe, however, that administrative convenience, in this instance, is insufficient justification for abandoning the principle that "interstate commerce may be made to pay its way."

FARMER, SPECIAL ADMININISTRATOR *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 25, ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 75-804. Argued November 8, 1976—Decided March 7, 1977

A member and officer (petitioner's decedent) of respondent local carpenters' Union brought a tort action for damages in California state court against respondent Unions and Union officials, alleging in count two of the complaint that, because of a sharp disagreement between him and Union officials over various internal Union policies, respondents had intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer emotional distress resulting in bodily injury; and alleging in other counts that respondent local Union had discriminated against him in referrals for employment in its hiring hall because of his dissident intra-Union political activities, that the Union had breached the hiring hall provisions of the collective-bargaining agreement with a contractors association by failing to refer him on a nondiscriminatory basis, and that such failure to comply with the collective-bargaining agreement also breached his membership contract with the union. The trial court sustained a demurrer to the allegations of discrimination and breach of contract on the ground that federal law pre-empted state jurisdiction over them, but allowed the case to go to trial on count two. The jury returned a verdict of actual and punitive damages for the plaintiff, and the trial court entered a judgment on the verdict. The California Court of Appeal reversed, holding that state courts had no jurisdiction over the complaint since the "crux" of the action concerned employment relations and involved conduct arguably subject to the National Labor Relations Board's jurisdiction. *Held:*

1. The National Labor Relations Act does not pre-empt the action for intentional infliction of emotional distress. Pp. 295-306.

(a) No provision of the NLRA protects the "outrageous conduct" complained of in count two, and regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for union officers' conduct that is so outrageous that "no reasonable man in a civilized society should be expected to endure it." Hence, permitting the state courts to exercise jurisdiction over such

complaints does not result in state regulation of federally protected conduct. Pp. 301–302.

(b) The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which the plaintiff complained, and that interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury or damage to reputation. Pp. 302–303.

(c) Viewed in light of the discrete concerns of the federal scheme of labor regulation and the state tort law, the potential for interference with the federal scheme by the state cause of action is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens, since the state tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context. Pp. 304–305.

(d) To permit concurrent state-court jurisdiction it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. P. 305.

2. It is clear from the record that the trial of the claim for intentional infliction of emotional distress did not meet the above standards, since the evidence supporting the verdict for the plaintiff focuses less on the alleged "outrageous conduct" complained of than on employment discrimination; hence the consequent risk that the verdict represented damages for employment discrimination rather than for instances of intentional infliction of emotional distress precludes reinstatement of the trial court's judgment. P. 306.

49 Cal. App. 3d 614, 122 Cal. Rptr. 722, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

G. Dana Hobart argued the cause and filed briefs for petitioner.

Leo Geffner argued the cause for respondents. With him on the brief was *George Kaufmann*.

Norton J. Come argued the cause for the National Labor Relations Board as *amicus curiae* urging affirmance. With

him on the brief were *Solicitor General Bork, John S. Irving, Carl L. Taylor,* and *Linda Sher.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether the National Labor Relations Act, as amended, pre-empts a tort action brought in state court by a Union member against the Union and its officials to recover damages for the intentional infliction of emotional distress.

I

Petitioner Richard T. Hill [1] was a carpenter and a member of Local 25 of the United Brotherhood of Carpenters and Joiners of America. Local 25 (Union) operates an exclusive hiring hall for employment referral of carpenters in the Los Angeles area. In 1965, Hill was elected to a three-year term as vice president of the Union. Shortly thereafter sharp disagreement developed between Hill and the Union Business Agent, Earl Daley, and other Union officials over various internal Union policies. According to Hill, the Union then began to discriminate against him in referrals to employers, prompting him to complain about the hiring hall operation within the Union and to the District Council and the International Union. Hill claims that as a result of these complaints he was subjected to a campaign of personal abuse and harassment in addition to continued discrimination in referrals from the hiring hall.[2]

**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] Hill died after the petition for a writ of certiorari was granted. On June 1, 1976, Joy A. Farmer, special administrator of Hill's estate, was substituted as petitioner. We will refer to Hill as the petitioner.

[2] According to Hill, the Union accomplished this discrimination by removing his name from the top of the out-of-work list and placing it at the bottom, by referring him to jobs of short duration when more desirable work was available, and by referring him to jobs for which he was not qualified.

In April 1969 petitioner filed in Superior Court for the County of Los Angeles an action for damages against the Union, the District Council and the International with which the Union was affiliated, and certain officials of the Union, including Business Agent Daley. In count two of his amended complaint, Hill alleged that the defendants had intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress resulting in bodily injury. In three other counts, he alleged that the Union had discriminated against him in referrals for employment because of his dissident intra-Union political activities, that the Union had breached the hiring hall provisions of the collective-bargaining agreement between it and a contractors association by failing to refer him on a nondiscriminatory basis, and that the failure to comply with the collective-bargaining agreement also constituted a breach of his membership contract with the Union. He sought $500,000 in actual, and $500,000 in punitive, damages.

The Superior Court sustained a demurrer to the allegations of discrimination and breach of contract on the ground that federal law pre-empted state jurisdiction over them, but allowed the case to go to trial on the allegations in count two.[3] Hill attempted to prove that the Union's campaign against him included "frequent public ridicule," "incessant verbal abuse," and refusals to refer him to jobs in accordance with the rules of the hiring hall. The defendants countered with evidence that the hiring hall was operated in a nondiscriminatory manner. The trial court instructed the jury that in order to recover damages Hill had to prove by a preponderance of the evidence that the defendants

[3] Hill did not appeal the Superior Court's ruling sustaining the demurrer with respect to the claims of discrimination and breach of contract, and we thus have no occasion to consider the applicability of the pre-emption doctrine to those counts.

intentionally and by outrageous conduct had caused him to suffer severe emotional distress. The court defined severe emotional distress as "any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worr[y]." The injury had to be "severe," which in this context meant

> "substantial or enduring, as distinguished from trivial or transitory. It must be of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it. Liability does not extend to mere insults, indignities, annoyances, petty or other trivialities."

The court also instructed that the National Labor Relations Board would not have jurisdiction to compensate petitioner for injuries such as emotional distress, pain and suffering, and medical expenses, nor would it have authority to award punitive damages. The court refused to give a requested instruction to the effect that the jury could not consider any evidence regarding discrimination with respect to employment opportunities or hiring procedures.

The jury returned a verdict of $7,500 actual damages and $175,000 punitive damages against the Union, the District Council, and Business Agent Daley, and the trial court entered a judgment on the verdict.[4]

The California Court of Appeal reversed. 49 Cal. App. 3d 614, 122 Cal. Rptr. 722. Relying on this Court's decisions in *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971); *Plumbers* v. *Borden*, 373 U. S. 690 (1963); *Iron Workers* v. *Perko*, 373 U. S. 701 (1963); and *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959), the Court of

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[4] Hill voluntarily dismissed the complaint against the International and one Union official, the trial court dismissed the complaint with respect to another Union official, and the jury entered a verdict in favor of two other Union officials.

Appeal held that the state courts had no jurisdiction over the complaint since the "crux" of the action concerned employment relations and involved conduct arguably subject to the jurisdiction of the National Labor Relations Board. The court remanded "with instructions to render judgment for the defendants and dismiss the action." 49 Cal. App. 3d, at 631, 122 Cal. Rptr., at 732. The California Supreme Court denied review.

We granted certiorari to consider the applicability of the pre-emption doctrine to cases of this nature, 423 U. S. 1086 (1976). For the reasons set forth below we vacate the judgment of the Court of Appeal and remand for further proceedings.

II

The doctrine of pre-emption in labor law has been shaped primarily by two competing interests.[5] On the one hand, this Court has recognized that "the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate." *Vaca* v. *Sipes*, 386 U. S. 171, 178–179 (1967), quoting *San Diego Bldg. Trades Council* v. *Garmon*, *supra*, at 242. On the other hand, because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to "declare pre-empted all local regulation that touches or con-

[5] "[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . , although the two are often not easily separable." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383 n. 19 (1969). The branch of the pre-emption doctrine most applicable to the instant case concerns the primary jurisdiction of the National Labor Relations Board.

cerns in any way the complex interrelationships between employees, employers, and unions . . . ." *Motor Coach Employees* v. *Lockridge, supra,* at 289. Judicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth in *Garmon, supra,* at 244, and recently reaffirmed in both *Lockridge, supra,* at 291, and *Machinists* v. *Wisconsin Emp. Rel. Comm'n,* 427 U. S. 132, 138–139 (1976):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress, and requirements imposed by state law." 359 U. S., at 244.[6]

But the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases.[7] We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,

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[6] The history of the *Garmon* doctrine was recently summarized in *Motor Coach Employees* v. *Lockridge,* 403 U. S., at 290–291, and in *Machinists* v. *Wisconsin Emp. Rel. Comm'n,* 427 U. S., at 138–139.

[7] "[W]e [cannot] proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." *Motor Coach Employees* v. *Lockridge, supra,* at 289–290.

we could not infer that Congress had deprived the States of the power to act." *Id.*, at 243–244. See, *e. g.*, *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966) (malicious libel); *Automobile Workers* v. *Russell*, 356 U. S. 634 (1958) (mass picketing and threats of violence); *Machinists* v. *Gonzales*, 356 U. S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees* v. *Lockridge*, *supra*, at 297–298. See *Vaca* v. *Sipes*, *supra* (duty of fair representation cases).[8]

These exceptions "in no way undermine the vitality of the pre-emption rule." 386 U. S., at 180. To the contrary, they highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme.

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[8] In addition to the judicially developed exceptions referred to in the text, Congress itself has created exceptions to the Board's exclusive jurisdiction in other classes of cases. Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, 29 U. S. C. § 187, authorizes anyone injured in his business or property by activity violative of § 8 (b) (4) of the NLRA, 61 Stat. 140, as amended, 29 U. S. C. § 158 (b) (4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. See *Teamsters* v. *Morton*, 377 U. S. 252 (1964). Section 301 of the LMRA, 29 U. S. C. § 185, authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). Section 14 (c) (2) of the NLRA, as added by Title VII, § 701 (a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U. S. C. § 164 (c) (2), permits state agencies and state courts to assert jurisdiction over "labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

The nature of the inquiry is perhaps best illustrated by *Linn* v. *Plant Guard Workers, supra.* Linn, an assistant manager of Pinkerton's National Detective Agency, filed a diversity action in federal court against a union, two of its officers, and a Pinkerton employee, alleging that the defendants had circulated a defamatory statement about him in violation of state law. If unfair labor practice charges had been filed, the Board might have found that the union violated § 8 by intentionally circulating false statements during an organizational campaign, or that the issuance of the malicious statements during the campaign had such a significant effect as to require that the election be set aside. Under a formalistic application of *Garmon,* the libel suit could have been pre-empted.

But a number of factors influenced the Court to depart from the *Garmon* rule. First, the Court noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 U. S., at 61, and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the Court recognized that there was " 'an overriding state interest' " in protecting residents from malicious libels, and that this state interest was " 'deeply rooted in local feeling and responsibility.' " *Id.,* at 61, 62. Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy. The Board's § 8 unfair labor practice proceeding would focus only on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions. *Id.,* at 63. Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. *Ibid.* Conversely, the state-law action would be unconcerned with whether the statements were coercive or

misleading in the labor context, and in any event the court would have power to award Linn relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule.

The Court was careful, however, to limit the scope of that exception. To minimize the possibility that state libel suits would either dampen the free discussion characteristic of labor disputes or become a weapon of economic coercion, the Court adopted by analogy the standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and held that state damages actions in this context would escape pre-emption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity. The Court also held that a complainant could recover damages only upon proof that the statements had caused him injury, including general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or any other form of harm recognized by state tort law. The Court stressed the responsibility of the trial judge to assure that damages were not excessive.

Similar reasoning underlies the exception to the pre-emption rule in cases involving violent tortious activity. Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute, *Automobile Workers* v. *Russell*, 356 U. S., at 640; *id.*, at 649 (Warren, C. J., dissenting); *Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 666 (1954), and thus there is no risk that state damages actions will fetter the exercise of rights protected by the NLRA. On the other hand, our cases consistently have recognized the historic state interest in "such traditionally local matters as public safety and order and the use of streets and highways." *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Bd.*, 315 U. S. 740, 749 (1942). And, as with the defamation actions preserved by *Linn*, state-court actions to redress injuries caused by violence or threats

of violence are consistent with effective administration of the federal scheme: Such actions can be adjudicated without regard to the merits of the underlying labor controversy. *Automobile Workers* v. *Russell, supra,* at 649 (Warren, C. J., dissenting).

Although cases like *Linn* and *Russell* involve state-law principles with only incidental application to conduct occurring in the course of a labor dispute, it is well settled that the general applicability of a state cause of action is not sufficient to exempt it from pre-emption. "[I]t [has not] mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations." [9] *Garmon,* 359 U. S., at 244. Instead, the cases reflect a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation. As was said in *Vaca* v. *Sipes,* 386 U. S., at 180, our cases "demonstrate that the decision to pre-empt federal and state court jurisdiction over

[9] In *Plumbers* v. *Borden,* 373 U. S. 690 (1963), for example, an employee sued his union, which operated a hiring hall, claiming that the union had arbitrarily refused to refer him for employment on one particular occasion. He alleged that the union's conduct constituted both tortious interference with his right to contract for employment and breach of a promise, implicit in his membership arrangement with the union, not to discriminate unfairly against any member or deny him the right to work. Under these circumstances, concurrent state-court jurisdiction would have impaired significantly the functioning of the federal system. If unfair labor practice charges had been filed, the Board might have concluded that the refusal to refer Borden was due to a lawful hiring hall practice, see *Teamsters* v. *NLRB,* 365 U. S. 667 (1961). Board approval of various hiring hall practices would be meaningless if state courts could declare those procedures violative of the contractual rights implicit between a member and his union. Accordingly, the state cause of action was pre-empted under *Garmon.* Similar reasoning prompted the Court to apply the *Garmon* rule in the companion case of *Iron Workers* v. *Perko,* 373 U. S. 701 (1963).

a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." [10]

III

In count two of his amended complaint, see *supra*, at 293, Hill alleged that the defendants had intentionally engaged in "outrageous conduct, threats, intimidation, and words" which caused Hill to suffer "grievous mental and emotional distress as well as great physical damage." In the context of Hill's other allegations of discrimination in hiring hall

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[10] *Machinists* v. *Gonzales*, 356 U. S. 617 (1958), established another exception to the general rule of pre-emption for state-law actions alleging expulsion from union membership in violation of the applicable union constitution and bylaws and seeking restoration to membership and damages due to the illegal expulsion. *Gonzales* was decided prior to this Court's adoption in *Garmon* of the current pre-emption test, and our decision in *Lockridge* makes it clear that "the full-blown rationale of *Gonzales* could not survive the rule of *Garmon*." *Lockridge*, 403 U. S., at 295. At the same time, we stated that "*Garmon* did not cast doubt upon the result reached in *Gonzales*," *id.*, at 295, since *Garmon* cited *Gonzales* as an example of the nonapplicability of the normal pre-emption rule "where the activity regulated was a merely peripheral concern of the . . . Act." 359 U. S., at 243.

Although the *Lockridge* decision has been the subject of extensive criticism, see, *e. g.*, Bryson, A Matter of Wooden Logic: Labor Law Pre-emption and Individual Rights, 51 Texas L. Rev. 1037, 1050–1058 (1973); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1368–1377 (1972), the instant case presents no occasion for us to reconsider the relationship between *Lockridge* and *Gonzales*. Whatever the scope of *Gonzales* after *Garmon* and *Lockridge*, the analysis used by the Court in those cases is consistent with the framework discussed in the text above. *Lockridge* held that the state-court action at issue involved a "real and immediate" potential for conflict with the federal scheme, 403 U. S., at 296, whereas the possibility that the state court in *Gonzales* "would directly and consciously implicate principles of federal law" was considered "at best tangential and remote." *Ibid.*

referrals, these allegations of tortious conduct might form the basis for unfair labor practice charges before the Board. On this basis a rigid application of the *Garmon* doctrine might support the conclusion of the California courts that Hill's entire action was pre-empted by federal law. Our cases indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme. With respect to Hill's claims of intentional infliction of emotional distress, we cannot conclude that Congress intended exclusive jurisdiction to lie in the Board.

No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." See *supra*, at 294. Thus, as in *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966), and *Automobile Workers* v. *Russell*, *supra*, permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.

The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell*, or damage to reputation, as in *Linn*. Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law, see W. Prosser, Law of Torts, § 12, pp. 49–50, 56 (4th ed. 1971), our decisions permitting the exercise of

state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

There is, to be sure, some risk that the state cause of action for infliction of emotional distress will touch on an area of primary federal concern. Hill's complaint itself highlights this risk. In those counts of the complaint that the trial court dismissed, Hill alleged discrimination against him in hiring hall referrals, which were also alleged to be violations of both the collective-bargaining agreement and the membership contract. These allegations, if sufficiently supported before the National Labor Relations Board, would make out an unfair labor practice [11] and the Superior Court considered them pre-empted by the federal Act.[12] Even in count two of

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[11] Discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8 (b) (1) (A) and 8 (b) (2) of the NLRA. See, *e. g., Radio Officers* v. *NLRB*, 347 U. S. 17 (1954); *Operating Engineers Local 18*, 205 N. L. R. B. 901 (1973), enf'd, 500 F. 2d 48 (CA6 1974).

Prior to the filing of this suit, Hill filed an unfair labor practice charge with the Board with respect to one specific instance of alleged discrimination. He alleged that the Union violated §§ 8 (b) (1) (A) and 8 (b) (2) by refusing to honor an employer's request that he be referred for employment on a particular construction job. The Board awarded Hill $2,517 in backpay.

[12] Whether a hiring hall practice is discriminatory and therefore violative of federal law is a determination Congress has entrusted to the Board. See *Teamsters* v. *NLRB*, 365 U. S. 667 (1961). Whether there is federal pre-emption with respect to allegations of breach of a *contractual* obligation depends upon the nature of the obligation and the alleged breach. See *Motor Coach Employees* v. *Lockridge*, 403 U. S., at 292–297, 298–301. Casting a complaint in terms of breach of a *membership agreement* does not necessarily insulate a state-court action from application of the pre-emption doctrine. See n. 9, *supra*. Allegations of breach of the contract between the union and the employer stand on different ground, since, as noted earlier, § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, authorizes suits for breach of a *collective-bargaining*

the complaint Hill made allegations of discrimination in "job-dispatching procedures" and "work assignments" which, standing alone, might well be pre-empted as the exclusive concern of the Board. The occurrence of the abusive conduct, with which the state tort action is concerned, in such a context of federally prohibited discrimination suggests a potential for interference with the federal scheme of regulation.

Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens. If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues. See n. 11, *supra*. Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Conversely, the state-court tort action can be adjudicated without resolution of the "merits" of the underlying labor dispute. Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. *State Rubbish Collectors Assn.* v. *Siliznoff*, 38 Cal. 2d 330, 240 P. 2d 282 (1952); *Alcorn* v. *Anbro Engineering, Inc.*, 2 Cal. 3d 493, 468 P. 2d 216 (1970). The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the

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agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See n. 8, *supra*.

contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context.

On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state-court jurisdiction. It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state-court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[13]

Two further limitations deserve emphasis. Our decision rests in part on our understanding that California law permits recovery only for emotional distress sustained as a result of "outrageous" conduct. The potential for undue in-

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[13] In view of the potential for interference with the federal scheme of regulation, the trial court should be sensitive to the need to minimize the jury's exposure to evidence of employment discrimination in cases of this sort. Where evidence of discrimination is necessary to establish the context in which the state claim arose, the trial court should instruct the jury that the fact of employment discrimination (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages.

terference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts. We also repeat that state trial courts have the responsibility in cases of this kind to assure that the damages awarded are not excessive. See *Linn* v. *Plant Guard Workers*, 383 U. S., at 65–66.

IV

Although the second count of petitioner's complaint alleged the intentional infliction of emotional distress, it is clear from the record that the trial of that claim was not in accord with the standards discussed above. The evidence supporting the verdict in Hill's favor focuses less on the alleged campaign of harassment, public ridicule, and verbal abuse, than on the discriminatory refusal to dispatch him to any but the briefest and least desirable jobs; [14] and no appropriate instruction distinguishing the two categories of evidence was given to the jury. See n. 13, *supra*. The consequent risk that the jury verdict represented damages for employment discrimination rather than for instances of intentional

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[14] Almost the entire section of petitioner's brief summarizing the trial transcript, see Brief for Petitioner 4–10, is directed at instances of Union discrimination against Hill with respect to employment opportunities. Moreover, counsel for petitioner, who was also petitioner's trial counsel, indicated at oral argument that the focus of the trial was on employment discrimination rather than the intentional infliction of emotional distress: "We had to show simply two easy issues to the jury: one, what the [hiring hall] rules were; and two, were they fairly applied." Tr. of Oral Arg. 69. It is plain that those two elements are more relevant to the issue of discriminatory referrals than to the issue of infliction of emotional distress.

Respondents concede that "[t]he allegations made in the plaintiff's second cause of action . . . sound in the state tort law of intentional infliction of emotional distress," but contend that the dominant focus of the evidence adduced at trial was on discriminatory hiring hall referrals. Brief for Respondents 28.

infliction of emotional distress precludes reinstatement of the judgment of the Superior Court.

The judgment of the Court of Appeal is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.[15]

It is so ordered.

[15] We, of course, express no view on the question whether those aspects of the case that are not pre-empted are sufficient under state law to amount to conduct "that no reasonable man in a civilized society should be expected to endure."

OKLAHOMA PUBLISHING CO. *v.* DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, OKLAHOMA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

No. 76-867. Decided March 7, 1977

A state court's pretrial order enjoining the news media from publishing the name or photograph of an 11-year-old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second-degree murder *held* to abridge the freedom of the press in violation of the First and Fourteenth Amendments. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539; *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469. These Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings that were in fact open to the public. Here, notwithstanding that a state statute provided for closed juvenile hearings unless specifically opened to the public by court order, it appears that whether or not the presiding judge made such an order, members of the press were in fact present at the boy's detention hearing with full knowledge of, and without objection by, the judge, the prosecutor, and defense counsel, and there is no evidence that petitioner newspaper publisher acquired the boy's name and photograph unlawfully or even without the State's implicit approval.

Certiorari granted; 555 P. 2d 1286, reversed.

PER CURIAM.

A pretrial order entered by the District Court of Oklahoma County enjoined members of the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child" in connection with a juvenile proceeding involving that child then pending in that court. On application for prohibition and mandamus challenging the order as a prior restraint on the press violative of the First and Fourteenth Amendments, the Supreme Court of the State of Oklahoma sustained the order. This Court entered a stay pending the timely filing and disposition of a petition for cer-

tiorari. 429 U. S. 967 (1976). We now grant the petition for certiorari and reverse the decision below.

A railroad switchman was fatally shot on July 26, 1976. On July 29, 1976, an 11-year-old boy, Larry Donnell Brewer, appeared at a detention hearing in Oklahoma County Juvenile Court on charges filed by state juvenile authorities alleging delinquency by second-degree murder in the shooting of this switchman. Reporters, including one from petitioner's newspapers, were present in the courtroom during the hearing and learned the juvenile's name. As the boy was escorted from the courthouse to a vehicle, one of petitioner's photographers took his picture. Thereafter, a number of stories using the boy's name and photograph were printed in newspapers within the county, including petitioner's three newspapers in Oklahoma City; radio stations broadcast his name and television stations showed film footage of him and identified him by name.

On August 3, 1976, the juvenile was arraigned at a closed hearing, at which the judge entered the pretrial order involved in this case.[1] Additional news reports identifying the juvenile appeared on August 4 and 5. On August 16, the District Court denied petitioner's motion to quash the order. The Oklahoma Supreme Court then denied petitioner's writ of prohibition and mandamus, relying on Oklahoma statutes providing that juvenile proceedings are to be held in private "unless specifically ordered by the judge to be conducted in public," and that juvenile records are open to public inspection "only by order of the court to persons having a legitimate

[1] In addition to enjoining publication of the name and picture of the juvenile, the order also enjoined law enforcement officials, juvenile authorities, and prosecution and defense counsel "from disclosing any information or making any comments concerning" the delinquency proceeding pending against the juvenile. Petitioner does not now challenge the restraints on counsel (which were rescinded in a modification of the order on August 5) or on public officials.

interest therein." Okla. Stat. Ann., Tit. 10, §§ 1111, 1125 (Supp. 1976).

As we noted in entering our stay of the pretrial order, petitioner does not challenge the constitutionality of the Oklahoma statutes relied on by the court below. Petitioner asks us only to hold that the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public. We think this result is compelled by our recent decisions in *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975).

In *Cox Broadcasting* the Court held that a State could not impose sanctions on the accurate publication of the name of a rape victim "which was publicly revealed in connection with the prosecution of the crime." *Id.*, at 471. There, a reporter learned the identity of the victim from an examination of indictments made available by a clerk for his inspection in the courtroom during a recess of court proceedings against the alleged rapists. The Court expressly refrained from intimating a view on any constitutional questions arising from a state policy of denying the public or the press access to official records of juvenile proceedings, *id.*, at 496 n. 26, but made clear that the press may not be prohibited from "truthfully publishing information released to the public in official court records." *Id.*, at 496.

This principle was reaffirmed last Term in *Nebraska Press Assn.* v. *Stuart*, *supra*, which held unconstitutional an order prohibiting the press from publishing certain information tending to show the guilt of a defendant in an impending criminal trial. In Part VI–D of its opinion, the Court focused on the information covered by the order that had been adduced as evidence in a preliminary hearing open to the public and the press; we concluded that, to the extent the order prohibited the publication of such evidence, "it plainly violated settled principles," 427 U. S., at 568, citing *Cox Broad-*

casting Corp. v. *Cohn, supra; Sheppard* v. *Maxwell,* 384 U. S. 333, 362–363 (1966) ("[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom"); and *Craig* v. *Harney,* 331 U. S. 367, 374 (1947) ("Those who see and hear what transpired [in the courtroom] can report it with impunity"). The Court noted that under state law the trial court was permitted in certain circumstances to close pretrial proceedings to the public, but indicated that such an option did not allow the trial judge to suppress publication of information from the hearing if the public was allowed to attend: "[O]nce a public hearing had been held, what transpired there could not be subject to prior restraint." 427 U. S., at 568.

The court below found the rationale of these decisions to be inapplicable here because a state statute provided for closed juvenile hearings unless specifically opened to the public by court order and because "there is no indication that the judge distinctly and expressly ordered the hearing to be public." We think *Cox* and *Nebraska Press* are controlling nonetheless. Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse. There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval. The name and picture of the juvenile here were "publicly revealed in connection with the prosecution of the crime," 420 U. S., at 471, much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain.[2] Under these circumstances, the District

[2] In *Cox Broadcasting* the Court quoted the following description by the reporter of the manner in which the name of the rape victim was revealed to him:

" '[D]uring a recess of the said trial, I approached the clerk of the court, who was sitting directly in front of the bench, and requested to see a copy

Court's order abridges the freedom of the press in violation of the First and Fourteenth Amendments.

The petition for certiorari is granted, and the judgment is

Reversed.

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of the indictments. In open court, I was handed the indictments, both the murder and the rape indictments, and was allowed to examine fully this document. . . . Moreover, no attempt was made by the clerk or anyone else to withhold the name and identity of the victim from me or from anyone else and the said indictments apparently were available for public inspection upon request.'" 420 U. S., at 473 n. 3.

Syllabus

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WEBSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 76–457. Decided March 21, 1977

Under § 215 of the Social Security Act, old-age benefits are computed on the basis of a wage earner's "average monthly wage" earned during his "benefit computation years" which are the "elapsed years" (reduced by five) during which his covered wages were highest. Until 1972, when the statute was amended to eliminate the distinction, "elapsed years" depended upon the wage earner's sex. Section 215 (b)(3) prescribed that the number of "elapsed years" for a male wage earner would be three higher than for an otherwise similarly situated female wage earner; for a male, the number of "elapsed years" equaled the number of years that elapsed after 1950 and before the year in which he became 65, whereas for a female the number of "elapsed years" equaled the number of years that elapsed after 1950 and before the year in which she became 62. Accordingly, a female could exclude from the computation of her "average monthly wage" three more lower earning years than a similarly situated male could exclude, and this would result in a slightly higher "average monthly wage" and correspondingly higher monthly old-age benefits for the retired female wage earner. On review of a denial of the request of appellee male wage earner (to whom the 1972 amendment did not apply because he reached age 62 before its effective date) that the more favorable formula be used to compute his old-age benefits, the District Court held that the statutory scheme violated the equal protection component of the Due Process Clause of the Fifth Amendment on the grounds that (1) to give women who reached age 62 before 1975 greater benefits than men of the same age and earnings record was irrational, and (2) in any event the 1972 amendment was to be construed to apply retroactively because otherwise it would be irrational. *Held:*

1. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives," *Craig* v. *Boren*, 429 U. S. 190, 197.

2. The statutory scheme itself, and the legislative history of former § 215 (b)(3), demonstrate that the statute was deliberately enacted to "redres[s] our society's longstanding disparate treatment of women,"

Califano v. *Goldfarb*, *ante*, at 209 n. 8, and was not "the accidental byproduct of a traditional way of thinking about females." *Ante*, at 223 (STEVENS, J., concurring in judgment). The statute operated directly to compensate women for past economic discrimination by allowing them to eliminate additional low-earning years from the calculation of their retirement benefits, and in no way penalized women wage earners.

3. The failure to make the 1972 amendment retroactive does not constitute discrimination on the basis of date of birth. Old-age benefits are not constitutionally immunized against alterations of this kind, but Congress may replace one constitutional computation formula with another and make the new formula prospective only.

413 F. Supp. 127, reversed.

PER CURIAM.

Under § 215 of the Social Security Act, as added, 64 Stat. 506, and amended, 42 U. S. C. § 415 (1970 ed. and Supp. V), old-age insurance benefits are computed on the basis of the wage earner's "average monthly wage" earned during his "benefit computation years" which are the "elapsed years" (reduced by five) during which the wage earner's covered wages were highest. Until a 1972 amendment, "elapsed years" depended upon the sex of the wage earner. Section 215 (b)(3) prescribed that the number of "elapsed years" for a male wage earner would be three higher than for an otherwise similarly situated female wage earner; for a male, the number of "elapsed years" equaled the number of years that elapsed after 1950 and before the year in which he attained age 65; for a female the number of "elapsed years" equaled the number of years that elapsed after 1950 and before the year in which she attained age 62.[1] Thus, a male born in 1900

[1] Under § 202 (a) of the Act, 42 U. S. C. § 402 (a) (1970 ed. and Supp. V), a fully insured individual who has reached retirement age is entitled upon application to a monthly old-age insurance benefit equal to his "primary insurance amount."

Section 215 (a) of the Act, 42 U. S. C. § 415 (a) (1970 ed. and Supp. V), sets out a table for determining the primary insurance amount. This

would have 14 "elapsed years" on retirement at age 65 but a female born in the same year would have only 11.[2] Accordingly, a female wage earner could exclude from the computa-

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amount is based on an individual's "average monthly wage" as defined in § 215 (b) of the Act, 42 U. S. C. § 415 (b) (1970 ed. and Supp. V).

Before it was amended in 1972, § 215 (b) of the Act, 42 U. S. C. § 415 (b), provided in part:

"(1) . . . [A]n individual's 'average monthly wage' shall be the quotient obtained by dividing—

"(A) the total of his wages paid in and self-employment income credited to his 'benefit computation years' (determined under paragraph (2)), by

"(B) the number of months in such years.

"(2)(A) The number of an individual's 'benefit computation years' shall be equal to the number of elapsed years (determined under paragraph (3) of this subsection), reduced by five; except that the number of an individual's benefit computation years shall in no case be less than two.

"(B) An individual's 'benefit computation years' shall be those computation base years, equal in number to the number determined under subparagraph (A), for which the total of his wages and self-employment income is the largest.

"(C) For purposes of subparagraph (B), 'computation base years' include only calendar years in the period after 1950 and prior to the earlier of the following years—

"(i) the year in which occurred . . . the first month for which the individual was entitled to old-age insurance benefits, or

"(ii) the year succeeding the year in which he died.

. . . . .

"(3) For purposes of paragraph (2), the number of an individual's elapsed years is the number of calendar years after 1950 . . . and before—

"(A) in the case of a woman, the year in which she died or, if it occurred earlier but after 1960, the year in which she attained age 62.

. . . . .

"(C) in the case of a man who has not died, the year occurring after 1960 in which he attained (or would attain) age 65."

[2] Congress eliminated the distinction in 1972. As amended by § 104 (b), 86 Stat. 1340, 42 U. S. C. § 415 (b)(3) (1970 ed., Supp. V), now provides:

"[T]he number of an individual's elapsed years is the number of calendar

tion of her "average monthly wage" three more lower earning years than a similarly situated male wage earner could exclude. This would result in a slightly higher "average monthly wage" and a correspondingly higher level of monthly old-age benefits for the retired female wage earner.[3] A single-judge District Court for the Eastern District of New York, on review under § 205 (g) of the Social Security Act, 42 U. S. C. § 405 (g), of a denial, after hearing, of appellee's request that the more favorable formula be used to compute his benefits, held that, on two grounds, the statutory scheme violated the equal protection component of the Due Process Clause of the Fifth Amendment: (1) that to give women who reached age 62 before 1975 greater benefits than men of the same age and earnings record was irrational,[4] and (2) that in any event the 1972 amendment was to be construed to apply retroactively, because construing the amendment to give men who reach age 62 in 1975 or later the benefit of the 1972 amendments but to deny older men the same benefit would render the amendment irrational, and therefore unconstitutional. 413 F. Supp. 127 (1976). We reverse.

To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, "classifications

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years after 1950 . . . and before the year in which he died, or if it occurred earlier but after 1960, the year in which he attained age 62."

The amendment, however, does not apply to men who reached age 62 before its effective date in 1972, and so the former statute continues to govern the determination of this and some other claims of male wage earners.

[3] For example, in this case, the District Court found that appellee was awarded a monthly benefit of $185.70, but that a similarly situated female wage earner would have been awarded $204 per month. 413 F. Supp. 127, 128.

[4] Four other federal courts have reached a contrary conclusion. *Gruenwald* v. *Gardner*, 390 F. 2d 591 (CA2), cert. denied *sub nom. Gruenwald* v. *Cohen*, 393 U. S. 982 (1968); *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (ED Pa. 1974), vacated on other grounds, 422 U. S. 1050 (1975); *Polelle* v. *Secretary of HEW*, 386 F. Supp. 443 (ND Ill. 1974); *McEvoy* v. *Weinberger*, CCH Unempl. Ins. Rep. ¶ 17,414 (SD Fla., Aug. 28, 1973).

by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective. *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Kahn* v. *Shevin*, 416 U. S. 351 (1974). But "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). Accordingly, we have rejected attempts to justify gender classifications as compensation for past discrimination against women when the classifications in fact penalized women wage earners, *Califano* v. *Goldfarb*, *ante*, at 209 n. 8; *Weinberger* v. *Wiesenfeld*, *supra*, at 645, or when the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination. *Califano* v. *Goldfarb*, *ante*, at 212–216 (plurality opinion), 221–222 (STEVENS, J., concurring in judgment); *Weinberger* v. *Wiesenfeld*, *supra*, at 648.

The statutory scheme involved here is more analogous to those upheld in *Kahn* and *Ballard* than to those struck down in *Wiesenfeld* and *Goldfarb*. The more favorable treatment of the female wage earner enacted here was not a result of "archaic and overbroad generalizations" about women, *Schlesinger* v. *Ballard*, *supra*, at 508, or of "the role-typing society has long imposed" upon women, *Stanton* v. *Stanton*, 421 U. S. 7, 15 (1975), such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents. Cf. *Califano* v. *Goldfarb*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*. Rather, "the only discernible purpose of [§ 215's more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women." *Califano* v. *Goldfarb*, *ante*, at 209 n. 8.

The challenged statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But as we have recognized: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." *Kahn* v. *Shevin*, 416 U. S., at 353. See generally *id.*, at 353–354, and nn. 4–6. Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.[5] Cf. *Schlesinger* v. *Ballard*, *supra*, at 508.

The legislative history of § 215 (b)(3) also reveals that Congress directly addressed the justification for differing treatment of men and women in the former version of that section and purposely enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women. Before 1956, the sexes were treated equally by § 215 (b)(3); the computation it required turned on the attainment of "retirement age," which was then defined in 42 U. S. C. § 416 (a) (1952 ed.) as 65 for both sexes.[6] In 1956, however, retirement age was redefined as 62 for women and 65 for men, Social Security Amendments of

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[5] Even with the advantage provided by former § 215 (b)(3), women on the average received lower retirement benefits than men. "As of December 1972, the average monthly retirement insurance benefit for males was $179.60 and for females, $140.50." *Polelle* v. *Secretary of HEW*, *supra*, at 444 (emphasis omitted).

[6] At that time, the calculation of the "average monthly wage" under § 215 (b) was somewhat different from the scheme set out in n. 1, *supra*, which was not adopted until Social Security Amendments of 1960, § 303 (a), 74 Stat. 960. The role of § 215 (b)(3) in the computation was similar under the old scheme, however, and the differences between the old and new methods of computation are essentially irrelevant to the effect of the 1956 change in the definition of retirement age on § 215 (b)(3).

1956, § 102 (a), 70 Stat. 809, thereby changing the calculation under § 215 (b)(3). A House Report emphasizes that this reduction in the retirement age for women was purposely made to remedy discrimination against women in the job market:

> "Your committee believes that the age of eligibility should be reduced to 62 for women workers. . . . A recent study by the United States Employment Service in the Department of Labor showed that age limits are applied more frequently to job openings for women than for men and that the age limits applied are lower." H. R. Rep. No. 1189, 84th Cong., 1st Sess., 7 (1955).[7]

The effect of this change on § 215 (b)(3) was also discussed in connection with the amendment of that section in 1961.[8] Social Security Amendments of 1961, § 102 (d)(2), 75 Stat. 135. During the hearings on that amendment Representative Watts asked why a woman would draw more benefits than a similarly situated man. After it was noted that this did not change the law as it had existed since 1956, Representative Boggs confirmed that the difference in treatment was not inadvertent:

> "If I may interrupt, I think we went into this at great length some years ago when we adopted the 62-year provision for women and the theory was that a woman at that age was less apt to have employment opportunities than a man and despite the fact of some statistics to the effect

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[7] Congress deliberately adopted the change notwithstanding the argument urged upon it that reducing the retirement age would not benefit women. S. Rep. No. 2133, 84th Cong., 2d Sess., 14–15 (1956).

[8] In 1961, in connection with the extension of reduced retirement benefits to men at age 62, the definition of retirement age in 42 U. S. C. § 416 (a) was repealed, and the differing ages for the computation of "elapsed years" under § 215 (b)(3) were written explicitly into that section for the first time. §§ 102 (c)(1), 102 (d)(2), 75 Stat. 134, 135. It was at that time that § 215 (b)(3) took on the form it was to retain until 1972. See nn. 1–2, *supra*.

> that women live longer than men, I think the other fact is equally commanding, so there is some justification for a distinction between men and women." Executive Hearings on Social Security Amendments of 1961, before the House Committee on Ways and Means, 87th Cong., 1st Sess., 146–147 (1961).

Thus, the legislative history is clear that the differing treatment of men and women in former § 215 (b)(3) was not "the accidental byproduct of a traditional way of thinking about females," *Califano* v. *Goldfarb, ante,* at 223 (STEVENS, J., concurring in judgment), but rather was deliberately enacted to compensate for particular economic disabilities suffered by women.

That Congress changed its mind in 1972 and equalized the treatment of men and women does not, as the District Court concluded, constitute an admission by Congress that its previous policy was invidiously discriminatory. 413 F. Supp., at 129. Congress has in recent years legislated directly upon the subject of unequal treatment of women in the job market.[9] Congress may well have decided that "[t]hese congressional reforms . . . have lessened the economic justification for the more favorable benefit computation formula in § 215 (b)(3)." *Kohr* v. *Weinberger,* 378 F. Supp. 1299, 1305 (ED Pa. 1974), vacated on other grounds, 422 U. S. 1050 (1975). Moreover, elimination of the more favorable benefit computation for women wage earners, even in the remedial context, is wholly consistent with those reforms, which require equal treatment of men and women in preference to the attitudes of "romantic paternalism" that have contributed to the "long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson,* 411 U. S. 677, 684 (1973).

Finally, there is no merit in appellee's argument that the failure to make the 1972 amendment retroactive constitutes

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[9] See, *e. g.,* Equal Pay Act of 1963, 29 U. S. C. § 206 (d); Civil Rights Act of 1964, § 703 (a), 42 U. S. C. § 2000e–2 (a).

discrimination on the basis of date of birth. Old-age benefit payments are not constitutionally immunized against alterations of this kind. *Flemming* v. *Nestor*, 363 U. S. 603 (1960). Congress expressly reserved "[t]he right to alter, amend, or repeal any provision" of the Act, 42 U. S. C. § 1304, and the Fifth Amendment "does not forbid . . . statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502, 505 (1911). It follows that Congress may replace one constitutional computation formula with another and make the new formula prospective only.

Reversed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in the judgment.

While I am happy to concur in the Court's judgment, I find it somewhat difficult to distinguish the Social Security provision upheld here from that struck down so recently in *Califano* v. *Goldfarb*, *ante*, p. 199. Although the distinction drawn by the Court between this case and *Goldfarb* is not totally lacking in substance, I question whether certainty in the law is promoted by hinging the validity of important statutory schemes on whether five Justices view them to be more akin to the "offensive" provisions struck down in *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), or more like the "benign" provisions upheld in *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), and *Kahn* v. *Shevin*, 416 U. S. 351 (1974). I therefore concur in the judgment of the Court for reasons stated by MR. JUSTICE REHNQUIST in his dissenting opinion in *Goldfarb*, in which MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and I joined.

MORALES *v.* TURMAN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-5881. Decided March 21, 1977

A three-judge District Court was not required under 28 U. S. C. § 2281 to hear and determine an action challenging the constitutionality of the unwritten practices of the juvenile institutions administered by the Texas Youth Council, and a single District Judge properly exercised jurisdiction. The complaint did not meet the threshold requirements of § 2281 jurisdiction, since it "did not mention or challenge any rule or regulation" of the Youth Council "nor did it seek an injunction against enforcement of any identified rule." *Baxter* v. *Palmigiano*, 425 U. S. 308, 313 n. 2.

Certiorari granted; 535 F. 2d 864, reversed and remanded.

PER CURIAM.

The motion of American Orthopsychiatric Association et al. for leave to file a brief as *amici curiae* is granted.

This case from the United States Court of Appeals for the Fifth Circuit involves the proper scope of three-judge-court jurisdiction under 28 U. S. C. § 2281.* Petitioners brought suit challenging allegedly unconstitutional punitive and inhumane conditions in Texas institutions housing juvenile delinquents, and the failure to provide juveniles with

*Public Law 94-381, Aug. 12, 1976, 90 Stat. 1119, prospectively repealed 28 U. S. C. § 2281. For cases pending at the time of repeal, § 2281 still governs jurisdiction, and provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

the rehabilitation or treatment that justified their confinement. A single District Judge determined that the juveniles' constitutional rights had been violated, and ordered the parties to submit a curative plan. The Court of Appeals vacated the District Court's decision on the ground that a three-judge court should have been convened in accordance with § 2281. 535 F. 2d 864 (1976).

The appellate court reasoned that the challenged, unwritten practices of the juvenile institutions administered by the Texas Youth Council were revealed during trial to be statewide in impact and that therefore they were equivalent to a statute with statewide applicability within the meaning of § 2281. Under the Court of Appeals' analysis, the necessity of convening a three-judge court was thus not properly apparent until considerable factual development of the breadth and content of the Texas Youth Council's administrative practices had taken place.

In construing § 2281, this Court has concluded that the three-judge court procedure is brought into play in any "suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.'" *Phillips* v. *United States*, 312 U. S. 246, 251 (1941). We have never, however, considered the generalized, unwritten practices of administration to be equivalent to the "delegated legislation" of an administrative board. In fact that approach was specifically rejected in *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), involving a challenge brought in a single-judge court to the Rhode Island prison system's unwritten rule forbidding counsel at disciplinary hearings. In rejecting the argument that a three-judge court was necessary to resolve that challenge, we noted that the complaint did not meet the threshold requirements of § 2281 jurisdiction; it "did not mention or challenge any rule or regulation of the

Authority; nor did it seek an injunction against the enforcement of any identified rule." 425 U. S., at 313 n. 2. That description applies equally to the complaint in this case.

The ruling in *Baxter* merely reflected the consistent recognition that the three-judge court procedure is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States, supra,* at 251; see also *Gonzalez* v. *Automatic Employees Credit Union,* 419 U. S. 90, 98 (1974). The Court of Appeals' ruling improperly deviated from that understanding, and in addition it effectively transformed the jurisdictional inquiry from a threshold question to one depending upon the shifting proof during litigation, injecting intolerable uncertainty and potential delay into important litigation.

Accordingly we hold that the single District Judge properly exercised jurisdiction to decide this case, and that his judgment is reviewable on the merits in the Court of Appeals. See 28 U. S. C. § 1291. The petition for a writ of certiorari and the motion for leave to proceed *in forma pauperis* are granted, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

COSTELLO ET AL. *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-5920. Decided March 21, 1977

A three-judge District Court was not required under 28 U. S. C. § 2281 to hear and determine an action challenging the constitutionality of overcrowding in Florida's prisons, and a single District Judge properly exercised jurisdiction. That equitable relief might necessitate temporary suspension of a statute requiring prison officials to accept custody of prisoners does not mean that a three-judge court was required to grant such relief, since the applicability of § 2281 depends on whether a state statute is alleged to be unconstitutional, not on whether the remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes. Otherwise the threshold question of jurisdiction would have to be postponed until the merits had been resolved and the outlines of equitable relief discerned.

Certiorari granted; 539 F. 2d 547, reversed and remanded.

PER CURIAM.

The motion to strike the brief of the United States as *amicus curiae* is denied.

Petitioners in this case attacked the overcrowding in Florida's prisons as violative of the Cruel and Unusual Punishments Clause of the Eighth Amendment, made applicable to the States by the Fourteenth. A single District Judge found substantial constitutional violations and issued a preliminary injunction ordering the Division of Corrections either to reduce the inmate population or to increase prison capacity. In an en banc decision, the United States Court of Appeals for the Fifth Circuit vacated the District Court's decision on the ground that only a three-judge court convened in accordance with 28 U. S. C. § 2281 could order such relief. 539 F. 2d 547 (1976).

On its face, the complaint that initiated this case involved no challenge to state statutes or regulations. There was thus no reason at the beginning of this litigation to suspect that a three-judge court should hear the case. See *Moody* v. *Flowers*, 387 U. S. 97, 104 (1967); *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976); *Morales* v. *Turman*, *ante*, p. 322. In granting equitable relief, however, the District Court contemplated as one means of relieving the prison system's unconstitutional overcrowding the possibility that state prison officials would have to violate their statutory duty to continue to accept custody of prisoners properly committed to them. The Court of Appeals concluded that such equitable relief could be granted only by a three-judge court, apparently because it viewed the possible temporary suspension of an otherwise valid state statute to effectuate federally mandated relief as equivalent to finding that statute unconstitutional.

We cannot agree. The applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes. To hold otherwise would require postponing the threshold question of jurisdiction until the merits of the controversy had been fully resolved and the broad outlines of equitable relief discerned. Section 2281 embodies no such wasteful and uncertain mandate.

Since we conclude that the single District Judge properly exercised full jurisdiction in this case, and that his judgment is, therefore, reviewable on the merits in the Court of Appeals (28 U. S. C. § 1291), the petition for a writ of certiorari and the motion for leave to proceed *in forma pauperis* are granted, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

JUIDICE ET AL., JUDGES *v.* VAIL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 75–1397. Argued November 30, 1976—Decided March 22, 1977

Following their failure to satisfy judgments against them in various civil actions in New York State courts, appellees, pursuant to provisions of the New York Judiciary Law, were held in contempt by appellant justices, and except for appellees Ward and Rabasco, were fined and imprisoned for disobeying subpoenas to appear in supplemental proceedings brought by the respective judgment creditors in an attempt to collect the judgments. Appellees subsequently brought a class action against appellants in Federal District Court under 42 U. S. C. § 1983, seeking to have the statutory provisions authorizing contempt enjoined on federal constitutional grounds not raised in the state proceedings. By the time this action was filed all the appellees, except Ward and Rabasco, had paid their fines and were released from jail, whereas Ward and Rabasco alleged that they were threatened with imprisonment. The District Court declared the statute unconstitutional and enjoined its enforcement. *Held:*

1. Only appellees Ward and Rabasco have standing to seek injunctive relief, since they are subject to pending proceedings in the state courts. The other appellees, absent any allegation or finding that they were threatened with further proceedings, have no standing, since, having been released from jail, they no longer have a live controversy with appellants or other state officials as to either the contempt citations or the short periods of incarceration that would entitle them to injunctive relief. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, distinguished. Pp. 331–333.

2. The District Court erred in enjoining enforcement of the contempt procedures. *Younger* v. *Harris*, 401 U. S. 37; *Huffman* v. *Pursue, Ltd.*, *supra*. Pp. 333–339.

(a) The principles of federalism and comity enunciated in *Younger* and *Huffman* apply to a case in which the State's contempt process is involved. Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal, the salient fact is that federal-court interference with the State's contempt process is "an offense to the State's interest . . . likely to be every bit as great as it would be were

this a criminal proceeding," *Huffman, supra,* at 604. Moreover, such interference with the contempt process not only "unduly interfere[s] with the [State's] legitimate activities," *Younger, supra,* at 44, but also "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'" *Huffman, supra,* at 604. Pp. 333–336.

(b) Appellees clearly had an *opportunity* to present their federal claims in the state proceedings, and no more is required to invoke *Younger* abstention. *Gerstein* v. *Pugh,* 420 U. S. 103, distinguished. Pp. 336–337.

(c) The exceptions to application of the *Younger* and *Huffman* principles are not present here, where it cannot be said that the New York statutes in question are flagrantly and patently unconstitutional, and where there are neither allegations, proof, nor findings that appellants are enforcing the contempt procedures in bad faith or are motivated by a desire to harass. Pp. 338–339.

406 F. Supp. 951, reversed.

REHNQUIST, J., delivered the opinion of the Court in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 339. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 341. STEWART, J., filed a dissenting opinion, *post,* p. 347.

A. Seth Greenwald, Assistant Attorney General of New York, argued the cause for appellants. With him on the briefs were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

Jane E. Bloom argued the cause for appellees. With her on the brief were *John D. Gorman, Joseph J. Levin, Jr.,* and *Morris Dees.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Harry Vail, Jr., is a judgment debtor who was held in contempt of court by the County Court of Dutchess County, N. Y., and who thereafter sought to have the statutory provisions authorizing contempts enjoined as unconstitutional

**Carl G. Dworkin* filed a brief for the New York State Consumer Protection Board as *amicus curiae* urging affirmance.

in an action brought under 42 U. S. C. § 1983 in the United States District Court for the Southern District of New York. The state-court proceedings against Vail were found by the District Court to be in most respects representative of those against the other named appellees as well.[1]

Vail defaulted on a credit arrangement with the Public Loan Co., and in January 1974, a default judgment for $534.36 was entered against him in the City Court of Poughkeepsie, N. Y. Three months later, when the judgment remained unpaid, Vail was served with a subpoena requiring him to attend a deposition so as to give information relevant to the satisfaction of the judgment.[2] The subpoena required him to appear at the office of the creditor's attorney on May 28, a little more than a month after the date on which it was served, and stated, as is required by N. Y. Civ. Prac. Law § 5223 (McKinney 1963), that "failure to comply . . . is punishable as a contempt of court."

Vail did not appear for the deposition. Nearly two months after the scheduled deposition date, appellant Juidice, a Justice of the Dutchess County Court, issued an order requiring Vail to appear in that court on August 13 to show cause why he should not be punished for contempt.[3] Vail failed to appear for that hearing. On August 30, appellant Juidice entered an order holding Vail in contempt and imposing a fine in the amount of $250 plus costs.[4] Vail failed to pay the

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[1] There originally were three named plaintiffs. Subsequent to the bringing of this suit, five additional named plaintiffs were added. We conclude, *infra*, at 331–333, that not all of the named plaintiffs had the requisite standing to seek the relief sought.

[2] The issuance of the subpoena is authorized by N. Y. Civ. Prac. Law §§ 5223 and 5224 (McKinney 1963). These subpoenas are issued by the creditor's attorney, acting, however, as an officer of the court, cf. N. Y. Civ. Prac. Law § 2308 (a) (McKinney 1974).

[3] N. Y. Jud. Law § 757 (1) (McKinney 1975).

[4] §§ 770, 772, 773. The fine was payable to the Public Loan Co. in reduction of its judgment.

fine. On September 23, appellant Juidice issued an *ex parte* commitment order,[5] and Vail was arrested and jailed pursuant to this order on October 1. He was released the following day when he paid the fine which had been imposed by the order.

Shortly thereafter, Vail, who had ignored for a period of more than nine months every stage of the state-court proceedings in which he had been a defendant, became a plaintiff in an action brought in the United States District Court. He and his coplaintiffs there sought to enjoin, on behalf of a class of judgment debtors, the use of the statutory contempt procedures authorized by New York law and employed by appellant justices on the ground that the procedures leading to imprisonment for contempt of court violated the Fourteenth Amendment to the United States Constitution. As they never appeared in the New York courts, they obviously did not raise these constitutional claims in the state-court proceedings. The contentions made before the District Court, however, *could* have been raised by appellees in the state courts, as a defense to the ongoing proceedings.[6] Had the County Court ruled against these contentions, appellees could have appealed to the Appellate Division of the Supreme Court.[7] They chose, by resorting to the federal courts, not to avail themselves of this forum afforded them by the State of New York. We must decide whether, with the existence of an available forum for raising constitutional issues in a state judicial proceeding, the United States District Court could properly entertain appellees' § 1983 action in light of our decisions in *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). We hold that it could not.

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[5] § 756.

[6] See n. 14, *infra*.

[7] See N. Y. Civ. Prac. Law § 5701 (a)(2) (McKinney 1963); *Rudd* v. *Rudd*, 45 App. Div. 2d 22, 356 N. Y. S. 2d 136 (1974).

I

A three-judge District Court was convened in response to appellees' complaint and the action was later certified as a Fed. Rule Civ. Proc. 23 (b)(2) class action. The class was defined to include "all persons who have been, or are presently subject to the civil contempt proceedings contained in the challenged sections of the Judiciary Law." App. to Jurisdictional Statement 18a. At the same time the District Court rendered an opinion granting partial summary judgment to the appellees and

> "declaring that Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York are unconstitutional on their face and permanently enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above sections of the Judiciary Law . . . ." *Id.*, at 20a.

Appellants in this Court challenged the District Court's failure to abstain on *Younger* grounds as well as its decision on the merits. We noted probable jurisdiction, 426 U. S. 946, and since we agree with appellants' first contention we do not reach the merits of the constitutional dispute.[8]

Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court. *North Carolina* v. *Rice*, 404 U. S. 244 (1971); *O'Shea* v. *Littleton*, 414 U. S. 488, 493–498 (1974). At the time this lawsuit was

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[8] Since we find that the District Court erred in reaching the merits of the injunctive claim, we need not decide whether the District Court's action in granting partial summary judgment was proper, when neither party had moved for summary judgment and when the state defendants had not yet answered the complaint.

commenced, or the additional appellees added, the named appellees, except Patrick Ward and Joseph Rabasco, had already been imprisoned pursuant to the contempt order, and, again excepting Ward and Rabasco, had been released after payment of the court-imposed fine. Ward had not been imprisoned, but alleged that he was "in imminent danger of being imprisoned pursuant to the Order of Contempt . . . ." Complaint ¶ 55. A temporary restraining order, which has remained in effect throughout this lawsuit, was issued by the District Court, enjoining the State from incarcerating Ward pursuant to the contempt order. Rabasco similarly alleged the threat of imprisonment after the issuance by the state court of an order to show cause which he has not complied with. The District Court restrained further state proceedings against Rabasco.

All of the named appellees, except Ward and Rabasco, then, having been released from jail, no longer had a live controversy with appellants or other New York State officials as to either the contempt citation or the short periods of incarceration which would entitle them to injunctive relief. These New York supplemental proceedings, which follow judgments on a debt, differ in this respect from the Ohio State proceedings involved in *Huffman, supra.* In *Huffman,* the Ohio State court had closed down the federal plaintiff's movie house for a period of time in the future. Although its decree had become final at the time the federal plaintiff instituted its federal action, the effect of the decree continued. 420 U. S., at 598. That plaintiff accordingly had the requisite standing. *O'Shea* v. *Littleton, supra,* at 495–496. Here, however, once the period of incarceration is served or the fine paid, the effect of the orders imposing a fine or commitment has expended itself. And, in the case where the payment of the fine satisfies the entire judgment, not only the orders in the supplemental proceedings but the original judgment as well is rendered *functus officio.* As

the complaint does not allege, and as the District Court did not find, that these appellees were threatened with further or repeated proceedings, only Ward and Rabasco had the necessary standing to seek injunctive relief.[9] See *Ellis* v. *Dyson*, 421 U. S. 426 (1975); *Steffel* v. *Thompson*, 415 U. S. 452 (1974). Appellees Ward and Rabasco do have standing, since they are subject to pending proceedings in the state courts. Since Ward and Rabasco have standing, and since their standing, unlike that of the plaintiff in *Steffel* v. *Thompson*, *supra*, is predicated on the existence of a pending, and not merely a threatened, proceeding, we deal with appellants' *Younger* contentions.

The District Court decided that our holdings in *Younger* and *Huffman* did not mandate dismissal of the complaint in this case, because the action sought to be enjoined in *Younger* was a criminal prosecution, and the action sought to be enjoined in *Huffman* was for the abatement of a civil nuisance and therefore closely akin to a criminal proceeding.[10] This

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[9] While several of the named appellees, upon payment of the fine, had satisfied the underlying default judgment, this is not true in all of the cases. Appellee Vail, for example, owed, pursuant to the default judgment, $534.36. His payment of the contempt fine of $250 plus costs, did not satisfy the full default judgment. As to him, and the other appellees similarly situated, since the underlying action on the debt, to which the contempt proceedings were ancillary, had not ended, it is conceivable that the prospect of further contempt orders in the underlying action could have given Vail the requisite constitutional standing to seek to enjoin the contempt processes as unconstitutional. But standing cannot be based on such speculative conjectures which are neither alleged nor proved. Since the complaint does not allege the likelihood, or even the possibility, of future contempt orders, none of the appellees, excepting Ward and Rabasco, have standing. *O'Shea* v. *Littleton*, 414 U. S. 488, 493–499 (1974); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).

[10] The District Court read *Younger* as applying "to civil proceedings only when intervention would disrupt the very interests which would underlie a state's criminal laws." *Vail* v. *Quinlan*, 406 F. Supp. 951, 958.

was not an implausible reading of our holdings in those cases, since in *Huffman*, the most recent of the two, we had reserved the applicability of abstention to civil cases generally in this language:

> "Informed by the relevant principles of comity and federalism, at least three Courts of Appeals have applied *Younger* when the pending state proceedings were civil in nature. See *Duke* v. *Texas*, 477 F. 2d 244 (CA5 1973); *Lynch* v. *Snepp*, 472 F. 2d 769 (CA4 1973); *Cousins* v. *Wigoda*, 463 F. 2d 603 (CA7 1972). For the purposes of the case before us, however, we need make no general pronouncements upon the applicability of *Younger* to all civil litigation. It suffices to say that for the reasons heretofore set out, we conclude that the District Court should have applied the tests laid down in *Younger* in determining whether to proceed to the merits of appellee's prayer for relief against this Ohio civil nuisance proceeding." 420 U. S., at 607.

We now hold, however, that the principles of *Younger* and *Huffman* are not confined solely to the types of state actions which were sought to be enjoined in those cases. As we emphasized in *Huffman*, the " 'more vital consideration' " behind the *Younger* doctrine of nonintervention lay not in the fact that the state criminal process was involved but rather in

> " 'the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' " *Huffman*, 420 U. S., at 601, quoting *Younger*, 401 U. S., at 44.

This is by no means a novel doctrine. In *Ex parte Young*, 209 U. S. 123 (1908), the watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers, the Court said:

> "But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. *Taylor* v. *Taintor*, 16 Wall. 366, 370; *Harkrader* v. *Wadley*, 172 U. S. 148." *Id.*, at 162.[11]

These principles apply to a case in which the State's contempt process is involved. A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. Perhaps it is not quite as important as is the State's interest in the enforcement of its criminal laws, *Younger*, *supra*, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*, *supra*. But we think it is of sufficiently great import to require application of the principles of those cases. The contempt power lies at the core of the administration of a State's judicial system, cf. *Ketchum* v. *Edwards*, 153 N. Y. 534, 539, 47 N. E. 918, 920 (1897). Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal in nature, we think the

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[11] Neither *Ex parte Young*, nor the cases cited by it, expressly premised this conclusion on § 5 of the Judiciary Act of 1793, 1 Stat. 335, or its successor sections (now 28 U. S. C. § 2283). These cases, rather, are "an application of the reason underlying the Act," *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 135 (1941), and reflect the applicability, wholly independent of a statutory codification, of the longstanding policies which inhere in the notions of comity and federalism, see *Younger*, 401 U. S., at 43–45; 1 J. Kent, Commentaries on American Law *411–412.

salient fact is that federal-court interference with the State's contempt process is "an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding," *Huffman, supra,* at 604.[12] Moreover, such interference with the contempt process not only "unduly interfere[s] with the legitimate activities of the Stat[e]," *Younger, supra,* at 44, but also "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles,' " *Huffman, supra,* at 604.[13]

The District Court relied upon our decision in *Gerstein* v. *Pugh,* 420 U. S. 103 (1975), to justify its refusal to dismiss appellees' suit, and it spoke of the possibility that a debtor in the position of appellees might be "thrown in jail without an *actual* hearing" (emphasis added). But *Gerstein* explained the reason for the inapplicability of *Younger* to that case in a way which clearly distinguishes it from this:

> "The District Court correctly held that respondents' claim for relief was not barred by the equitable

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[12] Contempt in these cases, serves, of course, to vindicate and preserve the private interests of competing litigants, *People ex rel. Munsell* v. *Court of Oyer and Terminer,* 101 N. Y. 245, 247–249, 4 N. E. 259, 259–261 (1886), but its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory, *Ketchum* v. *Edwards,* 153 N. Y. 534, 539, 47 N. E. 918, 920 (1897) ("The interest in maintaining respect for the action of courts, and of orderly jurisprudence, forbids that litigants should be permitted, under plea of hardship or injustice, real or pretended, to nullify or set at nought orders or decrees, however improvidently made, even if it may seem certain that the court acted in granting them under misapprehension or mistake"); cf. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 443 (1911); *King* v. *Barnes,* 113 N. Y. 476, 21 N. E. 182 (1889).

[13] As we did in *Huffman,* we save for another day the question of "the applicability of *Younger* to all civil litigation," 420 U. S., at 607.

> restrictions on federal intervention in state prosecutions, *Younger* v. *Harris*, 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, *an issue that could not be raised in defense of the criminal prosecution.*" 420 U. S., at 108 n. 9. (Emphasis added.)

Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings.[14] No more is required to invoke *Younger* abstention. There is no support in *Gerstein* or in our other cases for the District Court's belief that the state courts must have an *actual* hearing (to which a recalcitrant defendant would presumably be brought by force) in order for *Younger* and *Huffman* to apply. Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973), and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.[15] Presumptively, therefore, the principles which underlie *Younger* call for dismissal of the action.

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[14] The most propitious moment would have been at the hearing on the order to show cause. Even after the order of contempt had been issued, a motion to vacate pursuant to N. Y. Civ. Prac. Law § 5015 (McKinney Supp. 1976–1977) was available, and it would have been possible to seek a stay or a temporary restraining order on the fine and commitment, see N. Y. Civ. Prac. Law § 2201 (McKinney 1974); *Rudd* v. *Rudd*, 45 App. Div. 2d 22, 356 N. Y. S. 2d 136 (1974). Should the state courts ultimately have sustained the validity of the state statutory system, appellees would have had final recourse, available as of right, to this Court, 28 U. S. C. § 1257 (2).

[15] It does not appear settled in New York whether persons faced with civil contempt will be assigned counsel if indigent, see *Rudd* v. *Rudd*, *supra*; but cf. *In re Smiley*, 36 N. Y. 2d 433, 330 N. E. 2d 53 (1975) (no inherent power in courts to direct provision of counsel or to require

II

We noted in *Huffman* that *Younger* principles do not apply, even where otherwise applicable,

> "in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is '"flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."'" *Huffman*, 420 U. S., at 611.

We think it wholly impossible to say that the New York statutes in question here met the second part of this exception. Nor is the first part of the exception either alleged in appellees' complaint or proved by their evidence. While some paragraphs of the complaint could be construed to make such allegations as to the creditors, there are no comparable allegations with respect to appellant justices who issued the contempt orders. This exception may not be utilized unless it is alleged and proved that they are enforcing the contempt procedures in bad faith or are motivated by a desire to harass. Cf. *Cameron* v. *Johnson*, 390 U. S. 611, 619 (1968). There are neither allegations, proof, nor findings to that effect here.

We conclude that the District Court erred in enjoining enforcement of the New York Judiciary Law's contempt procedures for the reasons of federalism and

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the compensation of retained counsel in private suits; no "risk of loss of liberty or grievous forfeiture"). In any case, the relevant datum is that the due process contentions concerning assigned counsel, as with the other contentions, could have been presented to the New York State courts by the same parties or their attorneys who, instead, chose to ignore the pending state-court proceedings by filing this suit in federal court.

comity enunciated in *Younger* and *Huffman*.[16] Its judgment is accordingly

Reversed.

MR. JUSTICE STEVENS, concurring in the judgment.

The major premise underlying the Court's holding in *Younger* v. *Harris*, 401 U. S. 37, is that a court of equity should not act when the moving party has an adequate remedy at law.[1] Consistently with *Younger*, a court of equity may have a duty to act if the alternative legal remedy is inadequate. Indeed, the major premise underlying the Court's holding in *Mitchum* v. *Foster*, 407 U. S. 225, is a recognition of the unfortunate fact that state proceedings are sometimes inadequate to vindicate federal rights.[2]

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[16] Appellees Vail and McNair, apart from their request for declaratory and injunctive relief, also sought damages for alleged past violations of their constitutional rights stemming from the brief periods of incarceration. Appellants, however, are no longer involved in this aspect of the lawsuit, having been dismissed by the District Court on grounds of judicial immunity. Appellees have not challenged the District Court's dismissal of the state-court justices from those counts, and none of the parties here have addressed the issue of the availability of damages to these appellees. The issue of damages is therefore not before us, and we intimate no opinion as to the applicability of *Younger-Huffman* principles to a § 1983 suit seeking only such relief in the District Court. Cf. *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Huffman* v. *Pursue, Ltd.*, 420 U. S., at 607 n. 19, 609 n. 21.

[1] "The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger* v. *Harris*, 401 U. S., at 43–44.

[2] "Those who opposed the Act of 1871 [the forerunner of 42 U. S. C. § 1983] clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal

The ultimate question in this case concerns the constitutionality of New York procedures designed to discover the assets of delinquent judgment debtors. If, as appellees' contend, these procedures violate the Due Process Clause of the Fourteenth Amendment, they cannot provide an adequate remedy for appellees' federal claim.[3] For the federal remedy that appellees seek is protection against being required to participate in an unconstitutional judicial proceeding. Even

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rights. The debate was not about whether the predecessor of § 1983 extended to actions of state courts, but whether this innovation was necessary or desirable.

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum* v. *Foster*, 407 U. S., at 241–242.

In a footnote the Court quoted this comment by Congressman Coburn:

" 'The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . .' Cong. Globe, 42d Cong., 1st Sess., 460 (1871)." *Id.*, at 241 n. 31.

[3] The appellees argue that the procedures violate their due process rights because no proper notice of the fact that the noncooperating debtor is subject to incarceration for his actions is provided, because the procedures do not require a hearing with the debtor present prior to a finding of contempt and incarceration, and because the procedures do not provide for the right to counsel. If we assume that appellees are correct in their claim that they have a constitutional right to an actual hearing prior to incarceration, and that defects in the notice prevent the merits of that claim from being adjudicated in the state courts until after the incarceration has occurred, by hypothesis the state procedure cannot be adequate because appellees will have suffered the harm they seek to avoid before the state proceeding is concluded. Cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 108 n. 9.

ultimate success in such a proceeding would not protect them from the harm they seek to avoid. The challenged state procedures, therefore, cannot themselves provide an adequate remedy for the alleged federal wrong.[4] By hypothesis, in a case such as this, *Younger* abstention is inappropriate.

I am less certain about the possible applicability of *Pullman* abstention, *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, on which MR. JUSTICE STEWART relies. I am persuaded, however, that we know enough about the way the New York procedure is actually administered to form a reliable opinion about its validity. I believe, therefore, we have a duty to reach the merits.

As the Court's recitation of the facts demonstrates, the New York procedure provides for adequate notice and gives the debtor adequate opportunities to be heard. Moreover, there is no denial of the impecunious debtor's right to counsel because proof of indigency, which would necessarily precede any appointment of counsel, would also provide a defense to a contempt charge. The New York procedure does not, therefore, deny the judgment debtor due process of law. Accordingly, I concur in the Court's judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent. My earlier dissent in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 613–618 (1975), details the grounds for my disagreement with the Court's extension of *Younger* principles to *any* state civil proceedings, including the form they take in *Huffman* and the instant case, and no purpose would be served in restating those reasons here. I repeat, however, my strong disagreement with the process begun in *Huffman*, carried to the extreme in last Term's *Paul* v. *Davis*, 424 U. S. 693

[4] Perhaps another way to make the same point is to suggest that fidelity to the rationale of *Younger* would require the District Court to decide the merits of appellees' claims in order to decide whether to abstain.

(1976), and furthered today, of stripping all meaningful content from 42 U. S. C. § 1983. For, as I have said before: "Even if the extension of *Younger* v. *Harris* to pending state civil proceedings can be appropriate in any case . . . it is plainly improper in the case of an action by a federal plaintiff, as in this case, grounded upon 42 U. S. C. § 1983," 420 U. S., at 616. Congress created this cause of action over a century ago, and at the same time expressly charged the federal judicial system with responsibility for the vindication and enforcement of federal rights under it against unconstitutional action under color of state law "whether that action be executive, legislative, or *judicial*," *Mitchum* v. *Foster*, 407 U. S. 225, 240 (1972) (emphasis in original). In congressional contemplation, the pendency of state civil proceedings was to be wholly irrelevant. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." *Id.*, at 242. "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.*, at 239. That statute, and the Judiciary Act of 1875, 18 Stat. 470, which granted the federal courts general federal-question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws. These statutes constituted the lower federal courts " 'the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Steffel* v. *Thompson*, 415 U. S. 452, 464 (1974) (emphasis in original).

"In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly,

escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States.' . . . 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum. . . .'" *Zwickler* v. *Koota,* 389 U. S. 241, 248 (1967). This is true notwithstanding the possibility of review by this Court of state decisions, for "even when available by appeal rather than only by discretionary writ of certiorari, [that possibility] is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U. S. 411, 416 (1964).

In requiring the District Court to eject the federal plaintiff from the federal courthouse and to force him to seek vindication of his federal rights in pending state proceedings, the Court effectively cripples the congressional scheme enacted in § 1983. The crystal clarity of the congressional decision and purpose in adopting § 1983, and the unbroken line of this Court's cases enforcing that decision, expose *Huffman* and today's decision as deliberate and conscious floutings of a decision Congress was constitutionally empowered to make. It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum *because* of the pendency of state civil proceedings where Congress intended that the district court should entertain his suit *without regard* to the pendency of the state suit. Rather than furthering principles of comity and our federalism, forced federal abdication in this context undercuts one of the chief values of federalism—the protection and vindication of important and overriding

federal civil rights, which Congress, in § 1983 and the Judiciary Act of 1875, ordained should be a primary responsibility of the federal courts.

Mitchum v. *Foster, supra,* buttresses this conclusion. *Mitchum* held that § 1983 comes within the "expressly authorized" exception of 28 U. S. C. § 2283 so as to permit a federal district court in a § 1983 suit to stay a proceeding in a state court. The process begun in *Huffman* and furthered today of cutting back the remedies available in federal court under § 1983 plainly reintroduces much of the rigidity of § 2283, thus realizing the prophecy that if *Younger* were extended to civil cases, "the significance of *Mitchum* for those seeking relief from state civil proceedings would largely be destroyed, and the recognition of section 1983 as an exception to the Anti-Injunction Statute would have been a Pyrrhic victory." The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 217–218 (1972).

Today's decision extends *Huffman,* which labeled the state nuisance proceeding "in important respects . . . more akin to a criminal prosecution than are most civil cases." 420 U. S., at 604. By contrast the underlying suits in the New York courts here were collection suits typically involving small loans, and usually terminating in default judgments. Further, whereas in *Huffman* state officials were parties in the state-court suit, here those suits are between purely private parties. Whatever the importance of the State's direct interest in *Huffman* in closing theaters exhibiting alleged obscene films, one must strain hard to discover any comparable state interest here in having federal rights adjudicated in a state rather than a federal forum. Thus *Huffman*'s "quasi-criminal" rationale and today's reliance on state "contempt power" are revealed to be only covers for the ultimate goal of denying § 1983 plaintiffs the federal forum in any case, civil or criminal, when a pending state proceeding may hear the

federal plaintiff's federal claims.* This is nothing less than plain refusal to enforce the congressional direction, and for all practical purposes reduces *Mitchum* v. *Foster* to an empty shell.

Moreover, a requirement that the § 1983 plaintiff present his constitutional challenge in a suit between purely private parties pending in a state court may not be viewed as an unmixed blessing by the States. When *Younger* v. *Harris*, 401 U. S. 37 (1971), was decided, purely private state-court suits were seen as posing entirely different considerations from criminal prosecutions. *Id.*, at 55, and n. 2 (STEWART, J., concurring). Pending state criminal proceedings have always been viewed as paradigm cases involving paramount state interests. *Huffman*, 420 U. S., at 613–614 (BRENNAN, J., dissenting). But remitting the decision of the constitutionality of state statutes to state civil proceedings between purely private parties may actually run counter to state interests. If the State may not be heard in the state civil case, defense of the constitutionality of its statute would be solely in the hands of a party having neither the State's resources, expertise, nor governmental interest in sustaining the validity of the statute. A dilemma would be posed even for officials of a State like New York having procedures that permit, N. Y. Civ. Prac. Law § 1012 (b) (McKinney 1976), and in some cases require, N. Y. Exec. Law § 71 (McKinney 1972), state intervention in suits raising constitutional challenges to state statutes. They must choose whether to intervene in countless private lawsuits brought all over the State implicating the constitutionality of state statutes, or not to intervene and risk adverse decisions having effects far beyond the interests of the particular private

*I suspect that the purported disclaimer that "[a]s we did in *Huffman*, we save for another day the question of 'the applicability of *Younger* to all civil litigation . . . ,'" *ante*, at 336 n. 13, is tongue in cheek, and that "save" in today's disclaimer is a signal that merely the formal announcement is being postponed.

parties. By contrast, a § 1983 suit in federal court necessarily names the State or its officials as defendants, and the litigation focuses squarely on the issue of the validity of the statute, with the State defending its own interest directly.

Perhaps the process of eviscerating § 1983 should not come as a surprise. This Court in a series of decisions in other contexts has shaped the doctrines of jurisdiction, justiciability, and remedy so as increasingly to bar the federal courthouse door to litigants with substantial federal claims. See *Rizzo* v. *Goode*, 423 U. S. 362 (1976); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26 (1976); *Warth* v. *Seldin*, 422 U. S. 490 (1975); *O'Shea* v. *Littleton*, 414 U. S. 488 (1974). The determination to keep § 1983 litigants out of the federal courthouse if they can be remitted to a state court, reflected not only in *Huffman* and today's decision but in other decisions, *e. g.*, *Hicks* v. *Miranda*, 422 U. S. 332 (1975), hardly serves the values of federalism, any more than did last Term's decisions that so circumscribed the centuries-old remedy of habeas corpus as to weaken drastically the federal courts' ability to safeguard individuals from unconstitutional imprisonment. *Stone* v. *Powell*, 428 U. S. 465 (1976); *Francis* v. *Henderson*, 425 U. S. 536 (1976).

These decisions have in common that they have been rendered in the name of federalism. But they have given this great concept a distorted and disturbing meaning. Under the banner of vague, undefined notions of equity, comity, and federalism, the Court has embarked upon the dangerous course of condoning both isolated, *Paul* v. *Davis*, 424 U. S. 693 (1976), and systematic, *Rizzo* v. *Goode*, *supra*, violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly reflect the nature of our federalism. "Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing it has forgotten that one of the strengths of our federal

system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled." Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 502–503 (1977). I dissent.

MR. JUSTICE STEWART, dissenting.

The District Court found New York's statutorily specified civil contempt procedures constitutionally inadequate. It reached that conclusion without the benefit of a state-court construction of the statute's procedural requirements; without consideration of whether the procedural infirmities found were limited to the class of subpoenaed civil debtors who originally filed suit; without, indeed, a determination as to whether the challenged procedures accurately reflect statewide New York practice, or were instead confined to Dutchess County.* Constitutional adjudication in the face of such legal and factual imponderables is foolhardy: The subject matter of the suit is unclear, and the very need for constitutional adjudication is uncertain.

When a federal district court confronts such uncertainty in state law, its proper course is to abstain from final resolution of the federal issues until the state courts have been accorded an opportunity authoritatively to interpret the state statutory scheme being challenged. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496. The state-court construction may obviate or significantly modify the federal questions seemingly presented, thus avoiding "unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman* v. *Forssenius*, 380 U. S. 528, 534. Those considerations were sacrificed here, when the District Court nevertheless proceeded to measure the ambigu-

*The record suggests that the courts of New York City may apply the statutes in question in quite a different manner.

ous provisions of state law against the Due Process Clause of the Fourteenth Amendment.

Even though the prerequisites of *Pullman* abstention are clearly met in this case, the Court rejects a routine application of that established doctrine in favor of a novel extension of the *Younger-Huffman* line of "abstention" cases. *Younger* v. *Harris*, 401 U. S. 37; *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592. That is a departure from prior cases, which have not reached the *Younger* question when grounds for *Pullman* abstention were clear. See, *e. g.*, *Carey* v. *Sugar*, 425 U. S. 73; *Harrison* v. *NAACP*, 360 U. S. 167.

Both types of "abstention," of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between the two. Under *Pullman* abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under *Younger* it may not. The *Pullman* approach thus has the advantage of not altogether foreclosing access to federal courts to vindicate federal rights, while still avoiding needless friction in federal-state relations.

Viewing this case as a paradigm for *Pullman* abstention, I would set aside the judgment of the District Court and direct it to retain jurisdiction pending a definitive construction of the statutes in question by the courts of New York.

Syllabus

GARDNER *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 74–6593. Argued November 30, 1976—Decided March 22, 1977

Petitioner was convicted of first-degree murder in a Florida court. After the required separate sentencing hearing, the jury advised the court to impose a life sentence on the ground that the statutory mitigating circumstances required to be taken into account in imposing a sentence outweighed the aggravating circumstances. But the trial judge, relying in part on a presentence investigation report that he had ordered and portions of which were not disclosed to or requested by counsel for the parties, imposed the death sentence on the ground that a certain aggravating circumstance justified it and that there was no mitigating circumstance. The Florida Supreme Court affirmed the death sentence without expressly discussing petitioner's contention that the sentencing court had erred in considering the presentence report, including the confidential portion, in deciding to impose the death penalty, and without reviewing such confidential portion. *Held:* The judgment is vacated and the case is remanded. Pp. 355–364.

313 So. 2d 675, vacated and remanded.

MR. JUSTICE STEVENS, joined by MR. JUSTICE STEWART and MR. JUSTICE POWELL, concluded that:

1. Petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain. *Williams* v. *New York*, 337 U. S. 241, distinguished. Pp. 355–362.

(a) In light of the constitutional developments whereby it is now recognized that death is a different kind of punishment from any other and that the sentencing process, as well as the trial itself, must satisfy due process, the capital-sentencing procedure followed here is not warranted by any of the following justifications offered by the State: (i) an assurance of confidentiality is necessary to enable investigators to obtain relevant but sensitive disclosures about a defendant's background or character; (ii) full disclosure of a presentence report will unnecessarily delay the proceeding; (iii) such full disclosure, which often includes psychiatric and psychological evaluations, will occasionally disrupt the rehabilitation process; and (iv) trial judges can be trusted to exercise

their sentencing discretion in a responsible manner, even though their decisions may be based on secret information. Pp. 357–360.

(b) Even if it were permissible upon finding good cause to withhold a portion of a presentence report from the defendant, and even from defense counsel, nevertheless the full report must be made a part of the record to be reviewed on appeal. Since the State must administer its capital-sentencing procedures with an even hand, that record must disclose to the reviewing court the considerations motivating the death sentence in every case in which it is imposed, since otherwise the capital-sentencing procedure would be subject to the defects that resulted in the holding of unconstitutionality in *Furman* v. *Georgia*, 408 U. S. 238. Pp. 360–361.

(c) Here defense counsel's failure to request access to the full presentence report cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death, nor does such omission by counsel constitute an effective waiver of the constitutional error. Pp. 361–362.

2. The proper disposition of the case is to vacate the death sentence and remand the case to the Florida Supreme Court with directions to order further proceedings at the trial court level not inconsistent with this opinion, rather than, as the State urges, merely remanding the case to the Florida Supreme Court with directions to have the entire presentence report made a part of the record to enable that court to complete its reviewing function, since this latter procedure could not fully correct the error. P. 362.

MR. JUSTICE WHITE concluded, on the basis of the Eighth Amendment's ban on cruel and unusual punishments, that a procedure for selecting defendants for the death penalty that permits consideration of secret information in a presentence report relevant to the defendant's character and record fails to meet the "need for reliability in the determination that death is the appropriate punishment," *Woodson* v. *North Carolina*, 428 U. S. 280, 305. Pp. 362–364.

MR. JUSTICE BLACKMUN concurred in the judgment on the basis of the judgments in *Woodson* v. *North Carolina*, *supra*, and *Roberts* v. *Louisiana*, 428 U. S. 325. P. 364.

STEVENS, J., announced the Court's judgment and filed an opinion, in which STEWART and POWELL, JJ., joined. BURGER, C. J., concurred in the judgment. WHITE, J., *post*, p. 362, and BLACKMUN, J., *post*, p. 364, filed opinions concurring in the judgment. BRENNAN, J., filed a separate

opinion, *post*, p. 364. MARSHALL, J., *post*, p. 365, and REHNQUIST, J., *post*, p. 371, filed dissenting opinions.

Charles H. Livingston argued the cause for petitioner. With him on the briefs were *James A. Gardner, Jack Greenberg, James M. Nabrit III, Peggy C. Davis,* and *Anthony G. Amsterdam.*

Wallace E. Allbritton, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Robert L. Shevin,* Attorney General.

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE STEWART and MR. JUSTICE POWELL joined.

Petitioner was convicted of first-degree murder and sentenced to death. When the trial judge imposed the death sentence he stated that he was relying in part on information in a presentence investigation report. Portions of the report were not disclosed to counsel for the parties. Without reviewing the confidential portion of the presentence report, the Supreme Court of Florida, over the dissent of two justices, affirmed the death sentence. 313 So. 2d 675 (1975). We conclude that this procedure does not satisfy the constitutional command that no person shall be deprived of life without due process of law.

I

On June 30, 1973, the petitioner assaulted his wife with a blunt instrument, causing her death. On January 10, 1974, after a trial in the Circuit Court of Citrus County, Fla., a jury found him guilty of first-degree murder.

The separate sentencing hearing required by Florida law in capital cases [1] was held later on the same day. The State merely introduced two photographs of the decedent, otherwise

[1] Fla. Stat. Ann. § 921.141 (Supp. 1976). This Court upheld the constitutionality of the statute in *Proffitt* v. *Florida,* 428 U. S. 242.

relying on the trial testimony. That testimony, if credited, was sufficient to support a finding of one of the statutory aggravating circumstances, that the felony committed by petitioner "was especially heinous, atrocious, or cruel." [2]

In mitigation petitioner testified that he had consumed a vast quantity of alcohol during a day-long drinking spree which preceded the crime, and professed to have almost no recollection of the assault itself. His testimony, if credited, was sufficient to support a finding of at least one of the statutory mitigating circumstances.[3]

After hearing this evidence the jury was instructed to determine by a majority vote (1) whether the State had proved one of the aggravating circumstances defined by statute, (2) whether mitigating circumstances outweighed any such aggravating circumstance, and (3) based on that determination, whether the defendant should be sentenced to life or death.

After the jury retired to deliberate, the judge announced that he was going to order a presentence investigation of petitioner.[4] Twenty-five minutes later the jury returned its advisory verdict. It expressly found that the mitigating cir-

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[2] Fla. Stat. Ann. § 921.141 (5)(h) (Supp. 1976).

[3] The statute provides, in part:

"(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

. . . . . .

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

. . . . . .

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Fla. Stat. Ann. §§ 921.141 (6)(b), (f) (Supp. 1976).

[4] Florida Rules Crim. Proc. 3.710–3.713 authorize the presentence investigation. The Rules apply to all cases in which the trial court has discretion in sentencing, and make no reference to the special capital-sentencing procedure at issue here.

cumstances outweighed the aggravating circumstances and advised the court to impose a life sentence. App. 131.

The presentence investigation report was completed by the Florida Parole and Probation Commission on January 28, 1974. On January 30, 1974, the trial judge entered findings of fact and a judgment sentencing petitioner to death. His ultimate finding was that the felony "was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to-wit: none." *Id.*, at 138. As a preface to that ultimate finding, he recited that his conclusion was based on the evidence presented at both stages of the bifurcated proceeding, the arguments of counsel, and his review of "the factual information contained in said pre-sentence investigation." *Ibid.*

There is no dispute about the fact that the presentence investigation report contained a confidential portion which was not disclosed to defense counsel. Although the judge noted in his findings of fact that the State and petitioner's counsel had been given "a copy of that portion [of the report] to which they are entitled," *ibid.*, counsel made no request to examine the full report or to be apprised of the contents of the confidential portion. The trial judge did not comment on the contents of the confidential portion. His findings do not indicate that there was anything of special importance in the undisclosed portion, or that there was any reason other than customary practice for not disclosing the entire report to the parties.

On appeal to the Florida Supreme Court, petitioner argued that the sentencing court had erred in considering the presentence investigation report, including the confidential portion, in making the decision to impose the death penalty. The *per curiam* opinion of the Supreme Court did not specifically discuss this contention, but merely recited the trial judge's finding, stated that the record had been carefully reviewed, and concluded that the conviction and sentence should be

affirmed. The record on appeal, however, did not include the confidential portion of the presentence report.

Justice Ervin and Justice Boyd dissented on several grounds. They regarded the evidence as sufficient to establish a mitigating circumstance as a matter of law, and also concluded that it was fundamental error for the trial judge to rely on confidential matter not provided to the parties. They stated, in part:

> "Additionally, it appears from the record that there was a 'confidential' portion of the PSI report made available to the trial judge *which was not provided to either Appellant or Appellee.* In fact, it is unclear from the record whether this Court has been provided the 'confidential' portion thereof for our review, a critical final step between conviction and imposition of the death penalty—one of the safeguards outlined in *Dixon.* [*State* v. *Dixon,* 283 So. 2d 1 (1973).] What evidence or opinion was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such 'confidential' information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone." 313 So. 2d, at 678 (emphasis in original).

Petitioner's execution was stayed pending determination of the constitutionality of the Florida capital-sentencing procedure. Following the decision in *Proffitt* v. *Florida,* 428 U. S. 242, holding that the Florida procedure, on its face, avoids the constitutional deficiencies identified in *Furman* v. *Georgia,* 408 U. S. 238, the Court granted certiorari in this case, 428 U. S. 908, to consider the constitutionality of the trial judge's use of a confidential presentence report in this capital case.[5]

[5] In an appendix to its brief in this Court, the State has printed a copy of the confidential portion of the presentence report. Petitioner contests

II

The State places its primary reliance on this Court's landmark decision in *Williams* v. *New York*, 337 U. S. 241. In that case, as in this, the trial judge rejected the jury's recommendation of mercy and imposed the death sentence in reliance, at least in part, on material contained in a report prepared by the court's probation department. The New York Court of Appeals had affirmed the sentence, rejecting the contention that it was a denial of due process to rely on information supplied by witnesses whom the accused could neither confront nor cross-examine.

This Court referred to appellant's claim as a "narrow contention," *id.*, at 243, and characterized the case as one which

> "presents a serious and difficult question . . . relat[ing] to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant." *Id.*, at 244.

The conviction and sentence were affirmed, over the dissent of two Justices.

Mr. Justice Black's opinion for the Court persuasively reasons why material developed in a presentence investigation may be useful to a sentencing judge, and why it may not be

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its authenticity. He also argues, alternatively, that we should not review its contents because it was not made a part of the certified record in the state courts or in this Court; that consideration of the contents of the report in the first instance in this Court flouts the procedural regularity mandated for capital sentencing by *Furman* v. *Georgia*, 408 U. S. 238, and *Proffitt* v. *Florida;* or that, not having had an opportunity to present evidence to rebut the confidential portion of the report, it would be unfair and improper to require him to address its contents in this Court. Reply Brief for Petitioner 2–3.

It is not a function of this Court to evaluate in the first instance the possibly prejudicial impact of facts and opinions appearing in a presentence report. We therefore do not consider the contents of the appendix to the State's brief.

unfair to a defendant to rely on such information even if it would not be admissible in a normal adversary proceeding in open court. We consider the relevance of that reasoning to this case in Part III of this opinion. Preliminarily, however, we note two comments by Mr. Justice Black that make it clear that the *holding* of *Williams* is not directly applicable to this case.

It is first significant that in *Williams* the material facts concerning the defendant's background which were contained in the presentence report were described in detail by the trial judge in open court. Referring to this material, Mr. Justice Black noted:

> "The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise." *Ibid.*

In contrast, in the case before us, the trial judge did not state on the record the substance of any information in the confidential portion of the presentence report that he might have considered material.[6] There was, accordingly, no similar opportunity for petitioner's counsel to challenge the accuracy or materiality of any such information.

It is also significant that Mr. Justice Black's opinion recognized that the passage of time justifies a re-examination of capital-sentencing procedures. As he pointed out:

> "This whole country has traveled far from the period in which the death sentence was an automatic and com-

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[6] In fact, the only reference in the record to the confidential portion was the inference to be drawn from the ambiguous mention of the "'portion . . . to which they are entitled,'" *supra*, at 353, in the judge's written findings of fact issued on the day sentence was announced.

monplace result of convictions—even for offenses today deemed trivial." *Id.*, at 247–248.

Since that sentence was written almost 30 years ago, this Court has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society.[7]

III

In 1949, when the *Williams* case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was convicted of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature.[8] As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if, indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.

First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. *Gregg* v. *Georgia*, 428 U. S. 153, 181–188 (opinion of STEWART, POWELL, and STEVENS, JJ.); see *id.*, at 231–241 (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S., at 286–291 (BRENNAN, J., concurring), 306–310 (STEWART, J., concurring); see *id.*, at 314–371 (MARSHALL, J., concurring). From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the

[7] *Gregg* v. *Georgia*, 428 U. S. 153, 171–173, 179–181; *Furman* v. *Georgia*, *supra*, at 299–300 (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U. S. 183, 197–203; *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15.

[8] See *Williams* v. *New York*, 337 U. S. 241, 251–252.

sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa* v. *Rhay*, 389 U. S. 128; *Specht* v. *Patterson*, 386 U. S. 605. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See *Witherspoon* v. *Illinois*, 391 U. S. 510, 521–523.[9]

In the light of these developments we consider the justifications offered by the State for a capital-sentencing procedure which permits a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel.

The State first argues that an assurance of confidentiality to potential sources of information is essential to enable investigators to obtain relevant but sensitive disclosures from persons unwilling to comment publicly about a defendant's

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[9] The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.

"Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer*, 408 U. S. 471, 481.

background or character. The availability of such information, it is argued, provides the person who prepares the report with greater detail on which to base a sentencing recommendation and, in turn, provides the judge with a better basis for his sentencing decision. But consideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely. Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip, and may imply a pledge not to attempt independent verification of the information received. The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest.

If, as the State argues, it is important to use such information in the sentencing process, we must assume that in some cases it will be decisive in the judge's choice between a life sentence and a death sentence. If it tends to tip the scales in favor of life, presumably the information would be favorable and there would be no reason why it should not be disclosed. On the other hand, if it is the basis for a death sentence, the interest in reliability plainly outweighs the State's interest in preserving the availability of comparable information in other cases.

The State also suggests that full disclosure of the presentence report will unnecessarily delay the proceeding. We think the likelihood of significant delay is overstated because we must presume that reports prepared by professional probation officers, as the Florida procedure requires, are generally reliable.[10] In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding

[10] Our presumption that the reports are normally reliable is, of course, not inconsistent with our concern about the possibility that critical unverified information may be inaccurate and determinative in a particular case.

the disputed material. Or if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.

The State further urges that full disclosure of presentence reports, which often include psychiatric and psychological evaluations, will occasionally disrupt the process of rehabilitation. The argument, if valid, would hardly justify withholding the report from defense counsel. Moreover, whatever force that argument may have in noncapital cases, it has absolutely no merit in a case in which the judge has decided to sentence the defendant to death. Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a State may legitimately impose.

Finally, Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information. However acceptable that argument might have been before *Furman* v. *Georgia*, it is now clearly foreclosed.[11] Moreover, the argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Even if it were permissible to withhold a portion of the report from a defendant, and even from defense counsel, pursuant to an express finding of good cause for nondisclosure, it

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[11] *Furman* v. *Georgia*, 408 U. S., at 313–314 (WHITE, J., concurring). This argument is inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld, *Proffitt* v. *Florida*, 428 U. S., at 254.

would nevertheless be necessary to make the full report a part of the record to be reviewed on appeal. Since the State must administer its capital-sentencing procedures with an even hand, see *Proffitt* v. *Florida*, 428 U. S., at 250–253, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman* v. *Georgia*.[12] In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Nor do we regard this omission by counsel as an effective waiver of the constitutional error in the record. There are five reasons for this conclusion. First, the State does not urge that the objection has been waived. Second, the Florida Supreme Court has held that it has a duty to consider "the total record," *Swan* v. *State*, 322 So. 2d 485, 489 (1975), when it reviews a death sentence. Third, since two members of that court expressly considered this point on the appeal in this case, we presume that the entire court passed on the question. Cf. *Boykin* v. *Alabama*, 395 U. S. 238, 240–242, and n. 3. Fourth, there is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report. Cf. *Estelle* v. *Williams*, 425 U. S.

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[12] The Supreme Court of Florida decided petitioner's case before our decision in *Proffitt* v. *Florida*, *supra*, and before its own consideration of *Proffitt*, 315 So. 2d 461 (1975), or of *Tedder* v. *State*, 322 So. 2d 908 (1975). Therefore, we cannot join MR. JUSTICE MARSHALL's criticism of the Florida courts for their failure to follow the teaching of those cases.

501, 507–508. Fifth, since the judge found, in disagreement with the jury, that the evidence did not establish any mitigating circumstance, and since the presentence report was the only item considered by the judge but not by the jury, the full review of the factual basis for the judge's rejection of the advisory verdict is plainly required. For if the jury, rather than the judge, correctly assessed the petitioner's veracity, the death sentence rests on an erroneous factual predicate.

We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

IV

There remains only the question of what disposition is now proper. Petitioner's conviction, of course, is not tainted by the error in the sentencing procedure. The State argues that we should merely remand the case to the Florida Supreme Court with directions to have the entire presentence report made a part of the record to enable that court to complete its reviewing function. That procedure, however, could not fully correct the error. For it is possible that full disclosure, followed by explanation or argument by defense counsel, would have caused the trial judge to accept the jury's advisory verdict. Accordingly, the death sentence is vacated, and the case is remanded to the Florida Supreme Court with directions to order further proceedings at the trial court level not inconsistent with this opinion.

Vacated and remanded.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE WHITE, concurring in the judgment.

In *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the Court addressed the question whether the mandatory death penalty imposed under the statute involved in that case was

consistent with the *Eighth Amendment's* prohibition against cruel and unusual punishments. The plurality opinion stated:

> "The issue, like that explored in *Furman*, involves the *procedure* employed by the State to select persons for the unique and irreversible penalty of death." *Id.*, at 287. (Emphasis added.)

In holding that the failure to conduct the sort of post-trial sentencing proceeding which Florida law requires, and which was conducted in this case, rendered North Carolina's mandatory death penalty statute unconstitutional, the plurality said:

> "[W]e believe that in *capital cases* the fundamental respect for humanity underlying the *Eighth Amendment*, see *Trop* v. *Dulles*, 356 U. S. [86,] 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the *process* of inflicting the penalty of death.
>
> "This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference *in the need for reliability in the determination that death is the appropriate punishment in a specific case.*" *Id.*, at 304–305. (Emphasis added.)

The issue in this case, like the issue in *Woodson* v. *North Carolina*, *supra*, "involves the procedure" employed by the State in selecting persons who will receive the death penalty. Here the sentencing judge indicated that he selected petitioner Gardner for the death penalty in part because of information contained in a presentence report which information was not

disclosed to petitioner or to his counsel and to which petitioner had no opportunity to respond. A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the "character and record of the individual offender," *id.*, at 304, fails to meet the "need for reliability in the determination that death is the appropriate punishment" which the Court indicated was required in *Woodson, supra,* at 305. This conclusion stems solely from the Eighth Amendment's ban on cruel and unusual punishments on which the *Woodson* decision expressly rested, and my conclusion is limited, as was *Woodson,* to cases in which the death penalty is imposed. I thus see no reason to address in this case the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered in this case. For these reasons, I do not join the plurality opinion but concur in the judgment.

MR. JUSTICE BLACKMUN, concurring in the judgment.

Given the judgments of the Court in *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), and in *Roberts* v. *Louisiana,* 428 U. S. 325 (1976),* each attained by a plurality opinion of JUSTICES STEWART, POWELL, and STEVENS, in combination with respective concurrences in the judgment by JUSTICES BRENNAN and MARSHALL, I concur in the judgment the Court reaches in the present case.

MR. JUSTICE BRENNAN.

I agree for the reasons stated in the plurality opinion that the Due Process Clause of the Fourteenth Amendment is violated when a defendant facing a death sentence is not informed of the contents of a presentence investigation report made to the sentencing judge. However, I adhere to my

*See also *Proffitt* v. *Florida,* 428 U. S. 242 (1976); *Jurek* v. *Texas,* 428 U. S. 262 (1976); and *Gregg* v. *Georgia,* 428 U. S. 153 (1976).

view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). I therefore would vacate the death sentence, and I dissent from the Court's judgment insofar as it remands for further proceedings that could lead to its imposition.

MR. JUSTICE MARSHALL dissenting.

Last Term, this Court carefully scrutinized the Florida procedures for imposing the death penalty and concluded that there were sufficient safeguards to insure that the death sentence would not be "wantonly" and "freakishly" imposed. *Proffitt* v. *Florida*, 428 U. S. 242 (1976). This case, however, belies that hope. While I continue to believe that the death penalty is unconstitutional in all circumstances, see *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), and therefore would remand this case for resentencing to a term of life, nevertheless, now that Florida may legally take a life, we must insist that it be in accordance with the standards enunciated by this Court. In this case I am appalled at the extent to which Florida has deviated from the procedures upon which this Court expressly relied. It is not simply that the trial judge, in overriding the jury's recommendation of life imprisonment, relied on undisclosed portions of the presentence report. Nor is it merely that the Florida Supreme Court affirmed the sentence without discussing the omission and without concern that it did not even have the entire report before it. Obviously that alone is enough to deny due process and require that the death sentence be vacated as the Court now holds. But the blatant disregard exhibited by the courts below for the standards devised to regulate imposition of the death penalty calls into question the very basis for this Court's approval of that system in *Proffitt*.

In *Proffitt* v. *Florida*, *supra*, this Court gave its approval to the new death penalty statute of Florida, but very carefully spelled out its reasons for doing so. The joint opinion of JUSTICES STEWART, POWELL, and STEVENS (hereafter joint opinion) noted in particular that "[t]he Florida Supreme Court has stated . . . that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ,' *Tedder* v. *State*, 322 So. 2d 908, 910 (1975)," 428 U. S., at 249, and that the Florida "statute requires that if the trial court imposes a sentence of death, 'it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances.' [Fla. Stat. Ann.] § 921.141 (3) (Supp. 1976–1977)." *Id.*, at 250. In addition, the joint opinion, concerned that Florida provided no "specific form of review," found assurance in the fact that

> "[s]ince, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [*aggravating and mitigating*] *reasons present in one case will reach a similar result to that reached under similar circumstances in another case.* . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State* v. *Dixon*, 283 So. 2d 1, 10 (1973)." *Id.*, at 251. (Emphasis added.)

After studying the performance of the Florida Supreme Court in reviewing death cases, this Court satisfied itself that these guarantees were genuine and that "the Florida court has under-

taken responsibly to perform its function of death sentence review with a maximum of rationality and consistency," *id.*, at 258–259, and "has in effect adopted the type of proportionality review mandated by the Georgia statute" upheld in *Gregg* v. *Georgia, supra.* 428 U. S., at 259. The joint opinion placed great emphasis on this factor, reasoning that "because of its statewide jurisdiction, [the Florida Supreme Court] can assure consistency, fairness, and rationality in the evenhanded operation of the state law." *Id.*, at 259–260.

In the present case, however, the Florida Supreme Court engaged in precisely the "cursory or rubber-stamp review" that the joint opinion in *Proffitt* trusted would not occur. *Id.*, at 259. The jury, after considering the evidence, recommended a life sentence:

> "We, the Jury, have heard evidence, under the sentencing procedure in the above cause, as to whether aggravating circumstances which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances are defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the mitigating circumstances do outweigh the aggravating circumstances.
>
> "We therefore advise the Court that *a life* sentence should be imposed herein upon the defendant by the Court." App. 131.

The judge, however, ignored the jury's findings. His statutorily required written findings consisted of:

> "[T]he undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs [*sic*] the mitigating circumstance, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

"1. That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows: [followed by a list of 11 injuries to the deceased]." *Id.*, at 138–139.

The Florida Supreme Court affirmed with two justices dissenting. The *per curiam* consisted of a statement of the facts of the murder, a verbatim copy of the trial judge's "findings," a conclusion that no new trial was warranted, and the following "analysis":

"Upon considering all the mitigating and aggravating circumstances and careful review of the entire record in the cause, the trial court imposed the death penalty for the commission of the afore-described atrocious and heinous crime.

"Accordingly, the judgment and sentence of the Circuit Court are hereby affirmed.

"It is so ordered." 313 So. 2d 675 (1975).

From this quotation, which includes the entire legal analysis of the opinion, it is apparent that the State Supreme Court undertook none of the analysis it had previously proclaimed to be its duty. The opinion does not say that the Supreme Court evaluated the propriety of the death sentence. It merely says the trial judge did so. Despite its professed obligation to do so, the Supreme Court thus failed "to determine independently" whether death was the appropriate penalty. The Supreme Court also appears to have done nothing "to guarantee" consistency with other death sentences. Its opinion makes no comparison with the facts in other similar cases. Nor did it consider whether the trial judge was correct in overriding the jury's recommendation. There was no attempt to ascertain whether the evidence sustaining death was "so clear and convincing that virtually no

reasonable person could differ," *supra*, at 366. Indeed, it is impossible for me to believe that that standard can be met in this case.

As the plurality notes, *ante*, at 352, there are two mitigating factors that could apply to this case and apparently were found applicable by the jury: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Fla. Stat. Ann. §§ 921.141 (6)(b) and (f) (Supp. 1976). The purpose of these two categories is, as Justice Ervin observed in dissent below, " 'to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.' [*State* v. *Dixon*, 283 So. 2d 1, 10 (1973)]." 313 So. 2d, at 679.

I agree with Justice Ervin that petitioner is such a person. It is undisputed that he had been drinking virtually the entire day and night prior to the killing. Both court-appointed psychiatrists found that petitioner was an alcoholic and that "had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent, knowing right from wrong and being capable of adhering to the right." App. 11, 19. Furthermore, his actions after the murder—falling asleep with his wife's dead body, seeking his mother-in-law's help the next morning because his wife did not appear to be breathing properly, weeping when he realized she might be dead, and waiting for the police to come with no attempt to escape—are consistent with his being temporarily mentally impaired at the time of the crime. In light of these facts, it is not surprising that the jury found that the mitigating circumstances outweighed the aggravating.

Clearly, this is not a case where the evidence suggesting death is "so clear and convincing that virtually no reasonable person could differ." Had the Florida Supreme Court exam-

ined the evidence in the manner this Court trusted it would, I have no doubt that the jury recommendation of life imprisonment would have been reinstated. As Justice Ervin observed:

> "This was a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide. As I read our statutes, this type of crime does not merit the death penalty because the discretion exercised to impose that penalty here extends beyond the discretion the statutes repose in governmental officials for such purpose. I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death penalty in this state." 313 So. 2d, at 679.

In *Proffitt*, a majority of this Court was led to believe that Florida had established capital-sentencing procedures that would "assure that the death penalty will not be imposed in an arbitrary or capricious manner." 428 U. S., at 253. This case belies that promise and suggests the need to reconsider that assessment.*

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*The plurality responds, *ante*, at 361 n. 12, that it cannot criticize the Florida courts because the decision in petitioner's case preceded both our decision in *Proffitt* and the Florida Supreme Court's decision in *Proffitt* and *Tedder*. It conveniently ignores the fact that petitioner's case came after several key Florida death penalty cases, most notably *State* v. *Dixon*, 283 So. 2d 1 (1973), in which the Florida Supreme Court "guaranteed" that its review would insure similar results in similar cases. *Proffitt* v. *Florida*, 428 U. S. 242, 251 (1976), quoting *State* v. *Dixon*, *supra*, at 10.

More significantly, however, the plurality does not so much as question the procedure followed here and does nothing to insure that Florida will not again condemn this man to die in blatant disregard of its own rules. Compliance with *Proffitt* requires that on remand the trial judge give full consideration to the mitigating circumstances in the case and, if he again

MR. JUSTICE REHNQUIST, dissenting.

Had I joined the plurality opinion in last Term's *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), I would join the concurring opinion of my Brother WHITE in this case. But if capital punishment is not cruel and unusual under the Eighth and Fourteenth Amendments, as the Court held in that case, the use of particular sentencing procedures, never previously held unfair under the Due Process Clause, in a case where the death sentence is imposed cannot convert that sentence into a cruel and unusual punishment. The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed. I would therefore affirm the judgment of the Supreme Court of Florida.

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rejects the jury's recommendation of life imprisonment, his reasons "'be so clear and convincing that virtually no reasonable person could differ.'" 428 U. S., at 249. On review, the Florida Supreme Court must evaluate the facts itself and perform the comparative analysis it failed to do previously. It may be that my Brothers in the majority believe these requirements to be so obvious as not to need mention. Nevertheless, where a man's life is at stake, such blind faith is just not enough even after the decision in *Proffitt*.

SWAIN, REFORMATORY SUPERINTENDENT *v.* PRESSLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-811. Argued January 19, 1977—Decided March 22, 1977

Respondent, in custody pursuant to a sentence imposed by the Superior Court of the District of Columbia, applied in the United States District Court for the District of Columbia for a writ of habeas corpus seeking a review of the constitutionality of the proceedings that led to his conviction and sentence. The District Court dismissed the application on the basis of D. C. Code Ann. § 23-110 (g) (1973), which provides that an application for a writ of habeas corpus on behalf of a prisoner authorized to apply for collateral relief by motion in the Superior Court pursuant to the statute "shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief . . . ." The United States Court of Appeals for the District of Columbia Circuit reversed. Doubting the constitutionality of the statutory curtailment of the District Court's jurisdiction to issue writs of habeas corpus, the court construed the statute as merely requiring the exhaustion of local remedies before a habeas corpus petition could be filed in the District Court, and concluded that respondent had exhausted those remedies. *Held:*

1. Section 23-110 (g) prohibits the District Court from entertaining respondent's postconviction application for a writ of habeas corpus. The statute expressly covers the situation in which the applicant has exhausted his local remedies, and requires that the Federal District Court not entertain the habeas application in such a case. Moreover, the language of § 23-110 (g) was deliberately patterned after 28 U. S. C. § 2255, which created a new postconviction remedy in sentencing district courts, and provided that a habeas corpus petition may not be entertained elsewhere; § 23-110 (g) was plainly intended to achieve the parallel result in the District of Columbia by requiring collateral review of convictions from the Superior Court to be heard in that court. Pp. 377-378.

2. Section 23-110 (g) does not suspend the privilege of the writ of habeas corpus in violation of Art. I, § 9, cl. 2, of the Constitution. Pp. 379-384.

(a) The final clause of § 23–110 (g), which allows a Federal District Court to entertain a habeas corpus application if it "appears that the remedy by motion is inadequate or ineffective to test the legality of [the applicant's] detention," avoids any serious question about the statute's constitutionality. The substitution of a new collateral remedy that is neither inadequate nor ineffective does not constitute a suspension of the writ. Cf. *United States* v. *Hayman*, 342 U. S. 205, 223. P. 381.

(b) The collateral relief available in the Superior Court is neither ineffective nor inadequate simply because the judges of that court lack the protections of Art. III judges (life tenure and salary protection), for they must be presumed competent to decide all constitutional and other issues that routinely arise in criminal cases. Pp. 381–383.

169 U. S. App. D. C. 319, 515 F. 2d 1290, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined, and in Part I of which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 384. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 384.

Solicitor General Bork argued the cause for petitioner. With him on the brief were *Assistant Attorney General Thornburgh, Deputy Solicitor General Frey, Mark L. Evans, Paul L. Friedman, Shirley Baccus-Lobel,* and *Joseph S. Davies, Jr.*

Mark W. Foster argued the cause for respondent. With him on the brief were *Robert M. Weinberg* and *Frederick H. Weisberg.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent is in custody pursuant to a sentence imposed by the Superior Court of the District of Columbia.[1] He has filed an application for a writ of habeas corpus in the United States District Court for the District of Columbia asking that court to review the constitutionality of the proceedings that

[1] He received concurrent sentences of 32–96 months and 20–60 months following his conviction of grand larceny and larceny from the District of Columbia Government, in violation of D. C. Code §§ 22–2201 and 22–2206 (1973). He is now on parole.

led to his conviction and sentence. The question presented to us is whether § 23–110 (g) of the District of Columbia Code [2] prevents the District Court from entertaining the application.[3]

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[2] District of Columbia Code Ann. § 23–110 (1973) provides:

"(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

"(b) A motion for such relief may be made at any time.

"(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

"(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

"(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

[3] In *Pernell* v. *Southall Realty*, 416 U. S. 363, 368 n. 4, we noted that a question of this nature remained to be resolved.

Congress enacted § 23–110 (g) as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 608; that Act created a new local court system and transferred in its entirety the Federal District Court's responsibility for processing local litigation to the Superior Court of the District of Columbia.[4] Section 23–110 of the Code established a procedure for collateral review of convictions in the Superior Court; the procedure is comparable to that authorized by 28 U. S. C. § 2255 for the United States district courts. Section 23–110 (g) provides:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a

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[4] See *Palmore* v. *United States*, 411 U. S. 389, 392–393, n. 2, and *Pernell* v. *Southall Realty*, *supra*, at 367–368, for a description of the statute and its background. Prior to reorganization, the jurisdiction of the local District of Columbia courts was extremely circumscribed. In regard to criminal cases, for instance, the local courts had jurisdiction only over misdemeanors and petty offenses, and this jurisdiction was concurrent with that of the United States District Court. This left the United States District Court and the United States Court of Appeals for the District of Columbia Circuit with jurisdiction over numerous local criminal and civil cases which were proving to be a great burden to those courts, diverting their energies from questions of national importance which require prompt resolution by the federal courts of the Nation's Capital. S. Rep. No. 91–405, p. 3 (1969).

The District of Columbia Court Reform and Criminal Procedure Act of 1970 was designed to alleviate these burdens by transferring general jurisdiction over local matters to the Superior Court of the District of Columbia and all appeals from that court to the District of Columbia Court of Appeals ("the Highest Court of the District"), thus creating a system of courts analogous to those found in the States. "This transfer will bring the jurisdiction of the U. S. Courts in the District of Columbia in line with the jurisdiction exercised by the Federal courts in the several States, and will give the local courts jurisdiction over all purely local matters." S. Rep. No. 91–405, *supra*, at 5.

motion for relief under this section *or that the Superior Court has denied him relief*, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." [5] (Emphasis added.)

On the authority of this provision, the District Court dismissed respondent's application.[6] The Court of Appeals reversed. Largely because of its doubts concerning the constitutionality of a statutory curtailment of the District Court's jurisdiction to issue writs of habeas corpus, the Court of Appeals construed the statute as merely requiring exhaustion of local remedies before a habeas corpus petition could be filed in the District Court.[7] The Court of Appeals, unlike

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[5] The comparable section, 28 U. S. C. § 2255, reads in pertinent part as follows:

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

[6] In its original order of dismissal the District Court stated that it "does not have jurisdiction over this matter, by virtue of 23 D. C. Code § 110 (g)." Pet. for Cert. 66a. Later, in response to a *sua sponte per curiam* order of the Court of Appeals, quoted in part, 169 U. S. App. D. C. 319, 321, 515 F. 2d 1290, 1292 (1975), the District Court concluded that respondent had not exhausted his remedies in the local court system. Pet. for Cert. 67a–69a.

[7] The opinion of the Court of Appeals in this case, 169 U. S. App. D. C. 319, 515 F. 2d 1290 (1975), adopted the reasoning developed at length in its en banc decision in *Palmore* v. *Superior Court of District of Columbia*, 169 U. S. App. D. C. 323, 515 F. 2d 1294 (1975). This Court granted the Government's petition for certiorari which consolidated for consideration both this case and *Palmore*, 424 U. S. 907, and set the cases for oral argument. However, on the suggestion of the Solicitor General we vacated the judgment in *Palmore* and remanded that case to the Court of Appeals for further consideration in light of our recent decision in *Stone* v. *Powell*, 428 U. S. 465. 429 U. S. 915. Palmore had challenged his conviction on Fourth Amendment grounds.

the District Court, concluded that respondent had exhausted his local remedies and thus remanded the case to the District Court for consideration of the merits. The Government's petition for certiorari which we granted, 424 U. S. 907, did not question the Court of Appeals' conclusion regarding exhaustion.[8]

I

There are two reasons why § 23–110 (g) cannot fairly be read as merely requiring the exhaustion of local remedies before applying for a writ of habeas corpus in the District Court.

First, the statute expressly covers the situation in which the applicant has exhausted his local remedies, and requires that the application be denied in such a case. The statute provides that the application "shall not be entertained . . . by any Federal . . . court if it appears that . . . the Superior Court has denied [the applicant] relief." This unequivocal statutory command to federal courts not to entertain an application for habeas corpus *after* the applicant has been denied collateral relief in the Superior Court, is squarely at odds with the Court of Appeals' view that the statute deals only with the procedure the applicant must follow *before* he may request relief in the District Court.

Second, the language of § 23–110 (g) was deliberately patterned after 28 U. S. C. § 2255.[9] That section, enacted in

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[8] After respondent's conviction was affirmed by the District of Columbia Court of Appeals, he filed a *pro se* motion for a new trial in the Superior Court alleging ineffective assistance of counsel. An order denying that motion was affirmed on appeal. While that appeal was pending, respondent filed a second motion in the Superior Court; although that court denied the motion on jurisdictional grounds, the Court of Appeals reached the merits and affirmed.

[9] The House Report on the Act noted that § 23–110 was "modeled on 28 U. S. C. § 2255 with only necessary technical changes." H. R. Rep. No. 91–907, p. 117 (1970). The Senate Report has almost identical language. S. Rep. No. 91–405, p. 38 (1969). Moreover, the two provisions, § 2255 and § 23–110, contain almost identical language.

1948, 62 Stat. 967, substituted a new collateral-review procedure for the pre-existing habeas corpus procedure. Prior to the adoption of § 2255, the district courts for the districts in which federal prisoners were confined entertained habeas corpus petitions; since 1948, collateral review has been available pursuant to § 2255 only in the districts in which the convictions were obtained. Thus, § 2255 created a new postconviction remedy in the sentencing court and provided that a habeas corpus petition may not be entertained elsewhere.[10] See *United States* v. *Hayman*, 342 U. S. 205. Just as § 2255 was intended to substitute a different forum and a different procedure for collateral review of federal convictions, § 23–110 (g) was plainly intended to achieve a parallel result with respect to convictions in the District of Columbia.

Notwithstanding the desirability of adopting a construction of the statute which would avoid the constitutional issue raised by respondent, we are convinced that the language of § 23–110 (g) is sufficiently plain to require us simply to read it as it is written.[11]

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[10] Section 2255 allows an exception for the case in which the remedy is "inadequate or ineffective"; § 23–110 (g) contains the same exception. See *infra*, at 381.

[11] The Court of Appeals in *Palmore*, *supra*, at 328, 515 F. 2d, at 1299, gave special regard to "the principle of constitutional adjudication which makes it decisive in the choice of *fair alternatives* that one construction [which] may raise serious constitutional questions [be] avoided by another." *United States* v. *Rumely*, 345 U. S. 41, 45 (emphasis added). Along the same vein, Mr. Chief Justice Hughes has noted, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (emphasis added). Both of these references to that "cardinal principle" of statutory construction contain the caveat that resort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is "fairly possible" or when the statute provides a "fair alternative" construction.

Here the statute could not be more plain. It prohibits "any Federal . . . court" from entertaining a writ of habeas corpus if the applicant "has

II

Respondent argues [12] that § 23–110 (g), if read literally, violates Art. I, § 9, cl. 2, of the United States Constitution, which provides:

"The Privilege of the Writ of Habeas Corpus shall not

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failed to make a motion for relief" to the Superior Court or if "the Superior Court has denied him relief . . . ." Thus, the language of *United States* v. *Sullivan*, 332 U. S. 689, 693, is applicable:

"A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity."

[12] The Court below in *Palmore*, 169 U. S. App. D. C., at 333–335, 515 F. 2d, at 1304–1306, also suggested the possibility that § 23–110 (g) might be unconstitutional because it denied persons convicted in the Superior Court equal protection of the laws. These persons must assert any collateral attack on their convictions before Art. I judges, whereas persons convicted under general federal law are allowed to attack their convictions before Art. III judges. But precisely the same classification is made with respect to the original trial and appeal process, which we have already held constitutional. *Palmore* v. *United States*, 411 U. S. 389. It is certainly reasonable to make the same classification for collateral-review purposes as for purposes of trial and direct review.

A rational basis for the classification is found in the purpose behind the Court Reform Act. As one proponent of the Act noted, the Act "establishes a complete court system [for the District of Columbia] . . . . It includes transfer of all, not some, 'local' jurisdiction to the new court," the Superior Court for the District of Columbia, thus maximizing "the potential of the courts" and minimizing "overlapping jurisdiction." Statement of Associate Deputy Attorney General Santarelli, Hearings on Court Reorganization, Criminal Law Procedures, Bail, and Public Defender Service, before Subcommittee No. 1 of the House Committee on the District of Columbia, 91st Cong., 1st Sess., 13 (1969, pt. 1). He saw the transfer

> be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

His argument is made in two steps: (1) that the substitution of a remedy that is not "exactly commensurate" with habeas corpus relief available in a district court is a suspension of the writ within the meaning of the Clause; and (2) that because the judges of the Superior Court of the District of Columbia do not enjoy the life tenure and salary protection which are guaranteed to district judges by Art. III, § 1, of the Constitution, the collateral-review procedure authorized by § 23–110 (g) of the District of Columbia Code is not exactly commensurate with habeas corpus relief in the district courts.

The Government disputes both propositions. First, it contends that the constitutional provision merely prohibits suspension of the writ as it was being used when the Constitution was adopted; at that time the writ was not employed in collateral attacks on judgments entered by courts of competent jurisdiction.[13] Second, it contends that the procedure authorized by § 23–110 (g) is "exactly commensurate" with the pre-existing habeas corpus remedy.

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of jurisdiction over "habeas corpus" as part of the overall transfer of local jurisdiction. *Id.*, at 14. For a discussion of the numerous and important purposes behind the enactment of § 2255, purposes much like those which motivated enactment of § 23–110, see *United States* v. *Hayman*, 342 U. S. 205, 210–219.

[13] THE CHIEF JUSTICE's concurring opinion reminds us that Congress has broadened the scope of the writ of habeas corpus beyond the limits that obtained during the 17th and 18th centuries; he cites us to the article in which Judge Friendly observed that "[w]hat Congress has given, Congress can *partially* take away." Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 171 (1970) (emphasis added). That observation is more cautious than the conclusion that Congress may *totally* repeal all post-18th century developments in this area of the law. In any event, in view of the narrow basis for our decision, we have no occasion to address the broad issue discussed by THE CHIEF JUSTICE.

We are satisfied that the statute is valid, but we do not rest our decision on either of the broad propositions advanced by the Government. We are persuaded that the final clause in § 23–110 (g) avoids any serious question about the constitutionality of the statute. That clause allows the District Court to entertain a habeas corpus application if it "appears that the remedy by motion is inadequate or ineffective to test the legality of [the applicant's] detention." Thus, the only constitutional question presented is whether the substitution of a new collateral remedy which is both adequate and effective should be regarded as a suspension of the Great Writ within the meaning of the Constitution. The obvious answer to this question is provided by the Court's opinion in *United States* v. *Hayman:*

> "In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach constitutional questions." 342 U. S., at 223 (footnote omitted).

The Court implicitly held in *Hayman,* as we hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.

The question which remains is whether the remedy in the Superior Court of the District of Columbia created by § 23–110 is "inadequate or ineffective." We have already construed the remedy created by 28 U. S. C. § 2255 as the exact equivalent of the pre-existing habeas corpus remedy. *Hill* v. *United States,* 368 U. S. 424, 427.[14] Since the scope of the remedy provided

[14] We there stated: "Suffice it to say that it conclusively appears from the historic context in which § 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy *exactly*

by § 23–110 is the same as that provided by § 2255, it is also commensurate with habeas corpus in all respects save one—the judges who administer it do not have the tenure and salary protection afforded by Art. III of the Constitution.[15]

We are fully cognizant of the critical importance of life tenure, particularly when judges are required to vindicate the constitutional rights of persons who have been found guilty of criminal offenses.[16] The relationship between life tenure and judicial independence was vigorously explained by Mr. Justice Douglas in his dissenting opinion in *Palmore* v. *United States*, 411 U. S. 389, 410–422. But, as the Court held in that case, the Constitution does not require that all persons charged

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commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." 368 U. S., at 427 (emphasis added). See also *United States* v. *Hayman*, 342 U. S., at 219.

[15] In 1949, § 2255 was amended by inserting in the first paragraph of that provision "Court established by Act of Congress" for "Court of the United States." 63 Stat. 105. This was done to make "it clear that the section is applicable in the district courts in the Territories and possessions." H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949). The courts of the Territories are created under Art. I, not Art. III. *Palmore* v. *United States*, 411 U. S., at 402–403, and cases cited therein. Since that time, § 2255 motions made by persons convicted in the Territories have been heard by non-Art. III judges, and such a requirement has been deemed neither "inadequate [n]or ineffective." See *United States ex rel. Leguillou* v. *Davis*, 212 F. 2d 681 (CA3 1954). This situation, however, is slightly different from the present situation, in that a § 2255 motion made to a territorial court is reviewable in the United States courts of appeals, which are Art. III courts.

[16] We note that the respondent has not been deprived entirely of that protection. Under 28 U. S. C. § 1257 (3), this Court possesses jurisdiction to review final judgments of the District of Columbia Court of Appeals. Thus, an individual tried in the Art. I courts of the District of Columbia has two opportunities to seek review before this Court, whose Members do enjoy life tenure and salary protection—first, after affirmance of his conviction by the District of Columbia Court of Appeals, and second, after a judgment of that court resulting in the denial of relief under § 23–110.

with federal crimes be tried in Art. III courts.[17] That holding necessarily determines that the judges of the Superior Court of the District of Columbia must be presumed competent to decide all issues, including constitutional issues, that routinely arise in the trial of criminal cases. We must, therefore, presume that the collateral relief available in the Superior Court is neither ineffective nor inadequate simply because the judges of that court do not have life tenure.[18]

This conclusion is consistent with the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues, and that their decisions must be respected by federal district judges in processing habeas corpus applications pursuant to 28 U. S. C. § 2254. Normally a state judge's resolution of a factual issue will be presumed to be correct unless the factfinding procedure employed by the state court was not adequate.[19] It is equally permissible to presume that the judges of the Superior Court of the District of Columbia will correctly resolve constitutional issues unless it has been demonstrated, in accordance with the final clause of § 23–110 (g), that the remedy afforded by that court is "inadequate or ineffective." [20]

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[17] Indeed, as was noted by the majority in *Palmore*, "[v]ery early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state judges who did not enjoy the protections prescribed for federal judges in Art. III." 411 U. S., at 402.

[18] The same analysis applies to salary protections. Moreover the salary level for judges of the Superior Court and judges of the District of Columbia Court of Appeals are determined at a rate equal to 90% of the salary levels accorded United States district judges and United States circuit judges, respectively. D. C. Code Ann. §§ 11–703 (b), 11–904 (b) (1973).

[19] See 28 U. S. C. §§ 2254 (d) (2) and (3).

[20] In this case we have no occasion to consider what kind of showing would be required to demonstrate that the § 23–110 remedy is inadequate or ineffective in a particular case, or whether the character of the judge's tenure might be relevant to such a showing in a case presenting issues of extraordinary public concern.

Finding no reason to doubt the adequacy of the remedy provided by § 23–110, and having noted that its scope is commensurate with habeas corpus relief, we hold that § 23–110 (g) has not suspended the writ of habeas corpus within the meaning of Art. I, § 9, cl. 2.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court. In view, however, of the separate opinion filed today by THE CHIEF JUSTICE, I write merely to make clear that I do not read Part II of the Court's opinion as being incompatible with the views I have expressed previously with respect to the nature and scope of habeas corpus. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (1973) (POWELL, J., concurring).

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I join Part I of the Court's opinion and concur in the Court's judgment. However, I find it unnecessary to examine the adequacy of the remedy provided by § 23–110 (g) for I do not consider that the statute in any way implicates the respondent's rights under the Suspension Clause, Art. I, § 9, cl. 2, of the Constitution.

The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. The scope of the writ during the 17th and 18th centuries has been described as follows:

> "[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the

committing court." Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966).

Thus, at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial process; and (3) to inquire whether a committing court had proper jurisdiction. The writ in 1789 was not considered "a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority." *Id.*, at 451.

Dicta to the contrary in *Fay* v. *Noia*, 372 U. S. 391 (1963), have since been shown to be based on an incorrect view of the historic functions of habeas corpus. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 252–256 (1973) (POWELL, J., concurring). The fact is that in defining the scope of federal collateral remedies the Court has invariably engaged in statutory interpretation, construing what Congress has actually provided, rather than what it constitutionally must provide. See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1268 (1970). Judge Friendly has expressed this view clearly:

> "It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 170 (1970) (footnote omitted).

Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction, I see no issue of constitutional dimension raised by the statute in question. Under this view of the case, I need not consider the important constitutional question whether the Suspension

Clause protects the jurisdiction of the Art. III courts. A doctrine that allowed transfer of the historic habeas jurisdiction to an Art. I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention. See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1513–1514 (2d ed. 1973). However, I agree with Part I of the Court's opinion, namely that § 23–110 (g) was designed to preclude access to the District Court, not merely to assure exhaustion of local remedies and I would end the inquiry there. Congress has not provided access to the District Court and is under no compulsion to do so. I would therefore reverse the judgment on this basis.

Syllabus

BREWER, WARDEN *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74–1263. Argued October 4, 1976—Decided March 23, 1977

Respondent was arrested, arraigned, and committed to jail in Davenport, Iowa, for abducting a 10-year-old girl in Des Moines, Iowa. Both his Des Moines lawyer and his lawyer at the Davenport arraignment advised respondent not to make any statements until after consulting with the Des Moines lawyer upon being returned to Des Moines, and the police officers who were to accompany respondent on the automobile drive back to Des Moines agreed not to question him during the trip. During the trip respondent expressed no willingness to be interrogated in the absence of an attorney but instead stated several times that he would tell the whole story after seeing his Des Moines lawyer. However, one of the police officers, who knew that respondent was a former mental patient and was deeply religious, sought to obtain incriminating remarks from respondent by stating to him during the drive that he felt they should stop and locate the girl's body because her parents were entitled to a Christian burial for the girl, who was taken away from them on Christmas Eve. Respondent eventually made several incriminating statements in the course of the trip and finally directed the police to the girl's body. Respondent was tried and convicted of murder, over his objections to the admission of evidence relating to or resulting from any statements he made during the automobile ride, and the Iowa Supreme Court affirmed, holding, as did the trial court, that respondent had waived his constitutional right to the assistance of counsel. Respondent then petitioned for habeas corpus in Federal District Court, which held that the evidence in question had been wrongly admitted at respondent's trial on the ground, *inter alia*, that he had been denied his constitutional right to the assistance of counsel, and further ruled that he had not waived that right. The Court of Appeals affirmed. Petitioner warden claims that the District Court in making its findings of fact disregarded 28 U. S. C. § 2254 (d), which provides that, subject to certain exceptions, federal habeas corpus courts shall accept as correct the factual determinations made by state courts.

Held:

1. The District Court correctly applied 28 U. S. C. § 2254 (d) in its

resolution of the disputed evidentiary facts, where it appears that it made no findings of fact in conflict with those of the Iowa courts, and that its additional findings of fact based upon its examination of the state-court record were conscientiously and carefully explained and were approved by the Court of Appeals as being supported by the record. Pp. 395–397.

2. Respondent was deprived of his constitutional right to assistance of counsel. Pp. 397–401.

(a) The right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to a lawyer's help at or after the time that judicial proceedings have been initiated against him, and here there is no doubt that judicial proceedings had been initiated against respondent before the automobile trip started, since a warrant had been issued for his arrest, he had been arraigned, and had been committed to jail. Pp. 398–399.

(b) An individual against whom adversary proceedings have commenced has a right to legal representation when the government interrogates him, *Massiah* v. *United States*, 377 U. S. 201, and since here the police officer's "Christian burial speech" was tantamount to interrogation respondent was entitled to the assistance of counsel at the time he made the incriminating statements. Pp. 399–401.

3. The circumstances of record provide, when viewed in light of respondent's assertions of his right to counsel, no reasonable basis for finding that respondent waived his right to the assistance of counsel, the record falling far short of sustaining the State's burden to prove "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U. S. 458, 464. Pp. 401–406.

509 F. 2d 227, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. MARSHALL, J., *post*, p. 406, POWELL, J., *post*, p. 409, and STEVENS, J., *post*, p. 414, filed concurring opinions. BURGER, C. J., filed a dissenting opinion, *post*, p. 415. WHITE, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 429. BLACKMUN, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 438.

Richard C. Turner, Attorney General of Iowa, and *Richard N. Winders*, Assistant Attorney General, argued the cause and filed briefs for petitioner.

Robert Bartels by appointment of the Court, 423 U. S. 1044, argued the cause and filed a brief for respondent.*

MR. JUSTICE STEWART delivered the opinion of the Court.

An Iowa trial jury found the respondent, Robert Williams, guilty of murder. The judgment of conviction was affirmed in the Iowa Supreme Court by a closely divided vote. In a subsequent habeas corpus proceeding a Federal District

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**William J. Guste, Jr.*, Attorney General, and *Walter L. Smith, Jr.*, Assistant Attorney General, filed a brief for the State of Louisiana as *amicus curiae*.

Fred E. Inbau filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal, joined by *Wayne W. Schmidt* and by officials for their respective States as follows: *William J. Baxley*, Attorney General of Alabama; *Bruce E. Babbitt*, Attorney General of Arizona, and *Frank T. Galati*, Assistant Attorney General; *James Guy Tucker*, Attorney General of Arkansas; *Evelle J. Younger*, Attorney General of California, and *William E. James*, Senior Assistant Attorney General; *Robert L. Shevin*, Attorney General of Florida, and *E. J. Salcines, Jr.*; *Wayne L. Kidwell*, Attorney General of Idaho, and *Christopher D. Bray*, Deputy Attorney General; *William J. Scott*, Attorney General of Illinois, and *James B. Zagel*, Assistant Attorney General; *Theodore L. Sendak*, Attorney General of Indiana, and *Donald P. Bogard*, Executive Assistant Attorney General; *Francis B. Burch*, Attorney General of Maryland; *A. F. Summer*, Attorney General of Mississippi, and *Karen Gilfoy*, Assistant Attorney General; *Paul L. Douglas*, Attorney General of Nebraska, and *Melvin K. Kamerlohr*, Assistant Attorney General; *Robert List*, Attorney General of Nevada; *William F. Hyland*, Attorney General of New Jersey, and *Robert Del Tufo*, First Assistant Attorney General; *Louis J. Lefkowitz*, Attorney General of New York, and *Samuel A. Hirshowitz*, First Assistant Attorney General; *Allen I. Olson*, Attorney General of North Dakota; *Larry Derryberry*, Attorney General of Oklahoma, and *Robert McDonald*; *Daniel R. McLeod*, Attorney General of South Carolina; *Vernon B. Romney*, Attorney General of Utah, and *William W. Barrett*, Assistant Attorney General; *Andrew P. Miller*, Attorney General of Virginia, and *Reno S. Harp III*, Deputy Attorney General; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, and *David P. Cleek*, Assistant Attorney General; and *V. Frank Mendicino*, Attorney General of Wyoming, and *Gerald A. Stack*, Deputy Attorney General.

Court ruled that under the United States Constitution Williams is entitled to a new trial, and a divided Court of Appeals for the Eighth Circuit agreed. The question before us is whether the District Court and the Court of Appeals were wrong.

I

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436. The Davenport police then tele-

phoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his *Miranda* rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the *Miranda* warnings, and told Williams:

> "[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred again with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that

Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out—that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into

> Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines.[1] Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. After

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[1] The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

an evidentiary hearing the trial judge denied the motion. He found that "an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines," and that the evidence in question had been elicited from Williams during "a critical stage in the proceedings requiring the presence of counsel on his request." The judge ruled, however, that Williams had "waived his right to have an attorney present during the giving of such information." [2]

The evidence in question was introduced over counsel's continuing objection at the subsequent trial. The jury found Williams guilty of murder, and the judgment of conviction was affirmed by the Iowa Supreme Court, a bare majority of whose members agreed with the trial court that Williams had "waived his right to the presence of his counsel" on the automobile ride from Davenport to Des Moines. *State* v. *Williams*, 182 N. W. 2d 396, 402. The four dissenting justices expressed the view that "when counsel and police have agreed defendant is not to be questioned until counsel is present and defendant has been advised not to talk and repeatedly has stated he will tell the whole story after he talks with counsel, the state should be required to make a stronger showing of intentional voluntary waiver than was made here." *Id.*, at 408.

Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. Counsel for the State and for Williams stipulated that "the case would be submitted on the record of facts and proceedings in the trial court, without taking of further testimony." The District Court made findings of fact as summarized above, and concluded as a matter of law that the evidence in question had been wrongly admitted at

[2] The opinion of the trial court denying Williams' motion to suppress is unreported.

Williams' trial. This conclusion was based on three alternative and independent grounds: (1) that Williams had been denied his constitutional right to the assistance of counsel; (2) that he had been denied the constitutional protections defined by this Court's decisions in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436; and (3) that in any event, his self-incriminatory statements on the automobile trip from Davenport to Des Moines had been involuntarily made. Further, the District Court ruled that there had been no waiver by Williams of the constitutional protections in question. 375 F. Supp. 170.

The Court of Appeals for the Eighth Circuit, with one judge dissenting, affirmed this judgment, 509 F. 2d 227, and denied a petition for rehearing en banc. We granted certiorari to consider the constitutional issues presented. 423 U. S. 1031.

II

A

Before turning to those issues, we must consider the petitioner's threshold claim that the District Court disregarded the provisions of 28 U. S. C. § 2254 (d) in making its findings of fact in this case. That statute, which codifies most of the criteria set out in *Townsend* v. *Sain*, 372 U. S. 293, provides that, subject to enumerated exceptions, federal habeas corpus courts shall accept as correct the factual determinations made by the courts of the States.[3]

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[3] Title 28 U. S. C. § 2254 (d) provides:

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be

We conclude that there was no disregard of § 2254 (d) in this case. Although either of the parties might well have requested an evidentiary hearing in the federal habeas corpus proceedings, *Townsend* v. *Sain*, *supra*, at 322, they both instead voluntarily agreed in advance that the federal court should decide the case on the record made in the courts of the State. In so proceeding, the District Court made no

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presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

findings of fact in conflict with those of the Iowa courts. The District Court did make some additional findings of fact based upon its examination of the state-court record, among them the findings that Kelly, the Davenport lawyer, had requested permission to ride in the police car from Davenport to Des Moines and that Detective Leaming had refused this request. But the additional findings were conscientiously and carefully explained by the District Court, 375 F. Supp., at 175–176, and were reviewed and approved by the Court of Appeals, which expressly held that "the District Court correctly applied 28 U. S. C. § 2254 in its resolution of the disputed evidentiary facts, and that the facts as found by the District Court had substantial basis in the record," 509 F. 2d, at 231. The strictures of 28 U. S. C. § 2254 (d) require no more.[4]

B

As stated above, the District Court based its judgment in this case on three independent grounds. The Court of Appeals appears to have affirmed the judgment on two of those grounds.[5] We have concluded that only one of them need be considered here.

Specifically, there is no need to review in this case the doctrine of *Miranda* v. *Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination, *Michigan* v. *Tucker*, 417 U. S. 433, 438–439. It is equally unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made. Cf. *Spano* v. *New York*, 360 U. S. 315. For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived

[4] Whether Williams waived his constitutional rights was not, of course, a question of fact, but an issue of federal law. See discussion, *infra*, at 401–404.

[5] The Court of Appeals did not address the District Court's ruling that Williams' statements had been made involuntarily.

of a different constitutional right—the right to the assistance of counsel.

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable words for the Court 44 years ago in *Powell* v. *Alabama*, 287 U. S. 45, 57:

> "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. See *Kirby* v. *Illinois*, 406 U. S. 682; *Coleman* v. *Alabama*, 399 U. S. 1. But its basic contours, which are identical in state and federal contexts, *Gideon* v. *Wainwright*, 372 U. S. 335; *Argersinger* v. *Hamlin*, 407 U. S. 25, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, *supra*, at 689. See *Powell* v. *Alabama*, *supra*; *Johnson* v. *Zerbst*, 304 U. S. 458; *Hamilton* v. *Alabama*, 368 U. S. 52; *Gideon* v. *Wainwright*, *supra*; *White* v. *Maryland*, 373 U. S. 59; *Massiah* v. *United States*, 377 U. S. 201; *United*

States v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263; *Coleman* v. *Alabama*, *supra*.

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial:

> "Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?
>
> "A. I was sure hoping to find out where that little girl was, yes, sir.
>
> . . . . .
>
> "Q. Well, I'll put it this way: You was [*sic*] hoping to get all the information you could before Williams got back to McKnight, weren't you?
>
> "A. Yes, sir." [6]

[6] Counsel for petitioner, in the course of oral argument in this Court, acknowledged that the "Christian burial speech" was tantamount to interrogation:

"Q: But isn't the point, really, Mr. Attorney General, what you indi-

The state courts clearly proceeded upon the hypothesis that Detective Leaming's "Christian burial speech" had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements.[7] Yet no such constitutional protection would have come into play if there had been no interrogation.

The circumstances of this case are thus constitutionally indistinguishable from those presented in *Massiah* v. *United States*, *supra*. The petitioner in that case was indicted for violating the federal narcotics law. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial, and he was convicted. This Court reversed the conviction, holding "that the petitioner was denied the basic protections of that guarantee [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U. S., at 206.

That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant. See *ibid.*; *McLeod* v. *Ohio*, 381 U. S. 356; *United States* v. *Crisp*, 435 F. 2d 354, 358 (CA7);

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cated earlier, and that is the officer wanted to elicit information from Williams—

"A: Yes, sir.

"Q: —by whatever techniques he used, I would suppose a lawyer would consider that he were pursuing interrogation.

"A: It is, but it was very brief." Tr. of Oral Arg. 17.

[7] The Iowa trial court expressly acknowledged Williams' "right to have an attorney present during the giving of such information." See *supra*, at 394. The Iowa Supreme Court also expressly acknowledged Williams' "right to the presence of his counsel." See *ibid.*

United States ex rel. O'Connor v. *New Jersey*, 405 F. 2d 632, 636 (CA3); *Hancock* v. *White*, 378 F. 2d 479 (CA1). Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.[8] It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.

III

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel.[9] They held, however, that he had waived that right during the course of the automobile trip from Davenport to Des Moines. The state trial court explained its determination of waiver as follows:

> "The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant's part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court's conclusion that he voluntarily waived such right."

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[8] The only other significant factual difference between the present case and *Massiah* is that here the police had *agreed* that they would not interrogate Williams in the absence of his counsel. This circumstance plainly provides petitioner with no argument for distinguishing away the protection afforded by *Massiah*.

It is argued that this agreement may not have been an enforceable one. But we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law. And every court that has looked at this case has found an "agreement" in the sense of a commitment made by the Des Moines police officers that Williams would not be questioned about Pamela Powers in the absence of his counsel.

[9] See n. 7, *supra*.

In its lengthy opinion affirming this determination, the Iowa Supreme Court applied "the totality-of-circumstances test for a showing of waiver of constitutionally-protected rights in the absence of an express waiver," and concluded that "evidence of the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed desire for the aid of counsel before or at the time of giving information, were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged." 182 N. W. 2d, at 401, 402.

In the federal habeas corpus proceeding the District Court, believing that the issue of waiver was not one of fact but of federal law, held that the Iowa courts had "applied the wrong constitutional standards" in ruling that Williams had waived the protections that were his under the Constitution. 375 F. Supp., at 182. The court held "that it is the *government* which bears a heavy burden . . . but that is the burden which explicitly was placed on [Williams] by the state courts." *Ibid.* (emphasis in original). After carefully reviewing the evidence, the District Court concluded:

> "[U]nder the proper standards for determining waiver, there simply is no evidence to support a waiver. . . . [T]here is no affirmative indication . . . that [Williams] did waive his rights. . . . [T]he state courts' emphasis on the absence of a demand for counsel was not only legally inappropriate, but factually unsupportable as well, since Detective Leaming himself testified that [Williams], on several occasions during the trip, indicated that he would talk *after* he saw Mr. McKnight. Both these statements and Mr. Kelly's statement to Detective Leaming that [Williams] would talk only after seeing Mr. McKnight in Des Moines certainly were assertions of [Williams'] 'right or desire not to give information absent the presence of his attorney . . . .' Moreover, the statements were obtained only after Detec-

tive Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital—with the specific intent to elicit incriminating statements. In the face of this evidence, the State has produced no affirmative evidence whatsoever to support its claim of waiver, and, a fortiori, it cannot be said that the State has met its 'heavy burden' of showing a knowing and intelligent waiver of . . . Sixth Amendment rights." *Id.*, at 182–183 (emphasis in original; footnote omitted).

The Court of Appeals approved the reasoning of the District Court:

> "A review of the record here . . . discloses no facts to support the conclusion of the state court that [Williams] had waived his constitutional rights other than that [he] had made incriminating statements. . . . The District Court here properly concluded that an incorrect constitutional standard had been applied by the state court in determining the issue of waiver. . . .
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> . . . . .
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> "[T]his court recently held that an accused can voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. . . . The prosecution, however, has the weighty obligation to show that the waiver was knowingly and intelligently made. We quite agree with Judge Hanson that the state here failed to so show." 509 F. 2d, at 233.

The District Court and the Court of Appeals were correct in the view that the question of waiver was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires "application of constitutional principles to the facts as found . . . ." *Brown* v. *Allen*, 344 U. S. 443,

507 (separate opinion). See *Townsend* v. *Sain*, 372 U. S., at 309 n. 6, 318; *Brookhart* v. *Janis*, 384 U. S. 1, 4.

The District Court and the Court of Appeals were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law—that it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S., at 464. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, *Carnley* v. *Cochran*, 369 U. S. 506, 513; cf. *Miranda* v. *Arizona*, 384 U. S., at 471, and that courts indulge in every reasonable presumption against waiver, *e. g.*, *Brookhart* v. *Janis*, *supra*, at 4; *Glasser* v. *United States*, 315 U. S. 60, 70. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 238–240; *United States* v. *Wade*, 388 U. S., at 237.

We conclude, finally, that the Court of Appeals was correct in holding that, judged by these standards, the record in this case falls far short of sustaining petitioner's burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right. He consulted McKnight by long-distance telephone before turning himself in. He spoke with McKnight by telephone again shortly after being booked. After he was arraigned, Williams sought out and obtained legal advice from Kelly. Williams again consulted with Kelly after Detective Leaming and his fellow officer arrived in Davenport. Throughout, Williams was advised not to make any statements before seeing McKnight in Des Moines, and was

assured that the police had agreed not to question him. His statements while in the car that he would tell the whole story *after* seeing McKnight in Des Moines were the clearest expressions by Williams himself that he desired the presence of an attorney before any interrogation took place. But even before making these statements, Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey. Williams knew of that agreement and, particularly in view of his consistent reliance on counsel, there is no basis for concluding that he disavowed it.[10]

Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and

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[10] Cf. *Michigan* v. *Mosley*, 423 U. S. 96, 110 n. 2 (WHITE, J., concurring in result):

"[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism."

Fourteenth Amendments.[11] It only held, as do we, that he did not.

IV

The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues." *Haley* v. *Ohio*, 332 U. S. 596, 605 (Frankfurter, J., concurring in judgment). Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.

The judgment of the Court of Appeals is affirmed.[12]

It is so ordered.[13]

MR. JUSTICE MARSHALL, concurring.

I concur wholeheartedly in my Brother STEWART's opinion for the Court, but add these words in light of the dissenting

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[11] Compare, *e. g.*, *United States* v. *Springer*, 460 F. 2d 1344, 1350 (CA7); *Wilson* v. *United States*, 398 F. 2d 331 (CA5); *Coughlan* v. *United States*, 391 F. 2d 371 (CA9), with, *e. g.*, *United States* v. *Thomas*, 474 F. 2d 110, 112 (CA10); *United States* v. *Springer*, *supra*, at 1354–1355 (Stevens, J., dissenting); *United States ex rel. Magoon* v. *Reincke*, 416 F. 2d 69 (CA2), aff'g 304 F. Supp. 1014 (Conn.). Cf. *United States* v. *Pheaster*, 544 F. 2d 353 (CA9).

[12] The District Court stated that its decision "does not touch upon the issue of what evidence, if any, beyond the incriminating statements them-

[*Footnote 13 is on p. 407*]

opinions filed today. The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming's actions were perfectly proper, indeed laudable, examples of "good police work." In my view, good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York*, 360 U. S. 315, 320–321 (1959).

In this case, there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination, as Leaming himself understood those rights. Leaming knew that Williams had been advised

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selves must be excluded as 'fruit of the poisonous tree.'" 375 F. Supp. 170, 185. We, too, have no occasion to address this issue, and in the present posture of the case there is no basis for the view of our dissenting Brethren, *post*, at 430 (WHITE, J.); *post*, at 441 (BLACKMUN, J.), that any attempt to retry the respondent would probably be futile. While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. Cf. *Killough* v. *United States*, 119 U. S. App. D. C. 10, 336 F. 2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

[13] The Court of Appeals suspended the issuance of the writ of habeas corpus for 60 days to allow an opportunity for a new trial, and further suspended its issuance pending disposition of the petition for a writ of certiorari in this Court. In affirming the judgment of the Court of Appeals, we further suspend the issuance of the writ of release from custody for 60 days from this date to allow the State of Iowa an opportunity to initiate a new trial, and judgment will be entered accordingly.

by two lawyers not to make any statements to police until he conferred in Des Moines with his attorney there, Mr. McKnight. Leaming surely understood, because he had overheard McKnight tell Williams as much, that the location of the body would be revealed to police. Undoubtedly Leaming realized the way in which that information would be conveyed to the police: McKnight would learn it from his client and then he would lead police to the body. Williams would thereby be protected by the attorney-client privilege from incriminating himself by directly demonstrating his knowledge of the body's location, and the unfortunate Powers child could be given a "Christian burial."

Of course, this scenario would accomplish all that Leaming sought from his investigation except that it would not produce incriminating statements or actions from Williams. Accordingly, Leaming undertook his charade to pry such evidence from Williams. After invoking the no-passengers rule to prevent attorney Kelly from accompanying the prisoner, Leaming had Williams at his mercy: during the three- or four-hour trip he could do anything he wished to elicit a confession. The detective demonstrated once again "that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

Leaming knowingly isolated Williams from the protection of his lawyers and during that period he intentionally "persuaded" him to give incriminating evidence. It is this intentional police misconduct—not good police practice—that the Court rightly condemns. The heinous nature of the crime is no excuse, as the dissenters would have it, for condoning knowing and intentional police transgression of the constitutional rights of a defendant. If Williams is to go free—and given the ingenuity of Iowa prosecutors on retrial or in a civil commitment proceeding, I doubt very much that there is any chance a dangerous criminal will be loosed on the streets, the

bloodcurdling cries of the dissents notwithstanding—it will hardly be because he deserves it. It will be because Detective Leaming, knowing full well that he risked reversal of Williams' conviction, intentionally denied Williams the right of *every* American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the State.

I think it appropriate here to recall not Mr. Justice Cardozo's opinion in *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (1926), see opinion of THE CHIEF JUSTICE, *post*, at 416, and n. 1, but rather the closing words of Mr. Justice Brandeis' great dissent in *Olmstead* v. *United States*, 277 U. S. 438, 471, 485 (1928):

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

MR. JUSTICE POWELL, concurring.

As the dissenting opinion of THE CHIEF JUSTICE sharply illustrates, resolution of the issues in this case turns primarily on one's perception of the facts. There is little difference of opinion, among the several courts and numerous judges who have reviewed the case, as to the relevant constitutional principles: (i) Williams had the right to assistance of coun-

sel; (ii) once that right attached (it is conceded that it had in this case), the State could not properly interrogate Williams in the absence of counsel unless he voluntarily and knowingly waived the right; and (iii) the burden was on the State to show that Williams in fact had waived the right before the police interrogated him.

The critical factual issue is whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation. As my dissenting Brothers view the facts so differently from my own perception of them, I will repeat briefly the background, setting, and factual predicate to the incriminating statements by Williams—even though the opinion of the Court sets forth all of this quite accurately.

I

Prior to the automobile trip from Davenport to Des Moines, Williams had been arrested, booked, and carefully given *Miranda* warnings. It is settled constitutional doctrine that he then had the right to the assistance of counsel. His exercise of this right was evidenced uniquely in this case. Williams had consulted counsel prior to his arrest, and surrendered to the police on advice of counsel. At all times thereafter Williams, to the knowledge of the police, had two attorneys: McKnight, whom Williams consulted initially and who awaited his arrival in Des Moines, and Kelly, who had represented Williams in Davenport where he surrendered. Significantly, the recognition by the police of the status of counsel was evidenced by the *express agreement* between McKnight and the appropriate police officials that the officers who would drive Williams to Des Moines would not interrogate him in the absence of counsel.

The incriminating statements were made by Williams during the long ride while in the custody of two police officers, and in the absence of his retained counsel. The dissent of THE

CHIEF JUSTICE concludes that prior to these statements, Williams had "made a valid waiver" of his right to have counsel present. *Post*, at 417. This view disregards the record evidence clearly indicating that the police engaged in interrogation of Williams. For example, the District Court noted:

> "According to Detective Leaming's own testimony, the specific purpose of this conversation [which was initiated by Leaming and which preceded Williams' confession] was to obtain statements and information from [Williams] concerning the missing girl." 375 F. Supp. 170, 174.

In support of that finding, the District Court quoted extensively from Leaming's testimony, including the following:

> "Q. In fact, Captain, whether [Williams] was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?
>
> "A. I was sure hoping to find out where that little girl was, yes, sir.
>
> . . . . .
>
> "Q. Well, I'll put it this way: You were hoping to get all the information you could before Williams got back to McKnight, weren't you?
>
> "A. Yes, sir." *Ibid.*

After finding, upon a full review of the facts, that there had been "interrogation," the District Court addressed the ultimate issue of "waiver" and concluded not only that the State had failed to carry its burden but also that

> "there is *nothing* in the record to indicate that [Williams] waived his Fifth and Sixth Amendment rights *except* the fact that statements eventually were obtained." *Id.*, at 182. (Emphasis in original.)

The Court of Appeals stated affirmatively that "the facts

as found by the District Court had substantial basis in the record." 509 F. 2d 227, 231.[1]

I join the opinion of the Court which also finds that the efforts of Detective Leaming "to elicit information from Williams," as conceded by counsel for petitioner at oral argument, *ante*, at 400 n. 6, were a skillful and effective form of interrogation. Moreover, the entire setting was conducive to the psychological coercion that was successfully exploited. Williams was known by the police to be a young man with quixotic religious convictions and a history of mental disorders. The date was the day after Christmas, the weather was ominous, and the setting appropriate for Detective Leaming's talk of snow concealing the body and preventing a "Christian burial." Williams was alone in the automobile with two police officers for several hours. It is clear from the record, as both of the federal courts below found, that there was no evidence of a knowing and voluntary waiver of the right to have counsel present beyond the fact that Williams ultimately confessed. It is settled law that an inferred waiver of a constitutional right is disfavored. *Estelle* v. *Williams*, 425 U. S. 501, 515 (1976) (POWELL, J., concurring). I find no basis in the record of this case—or in the dissenting opin-

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[1] Before concluding that the police had engaged in interrogation, the District Court summarized the factual background:

"Detective Leaming obtained statements from Petitioner in the absence of counsel (1) after making, and then breaking, an agreement with Mr. McKnight that Petitioner would not be questioned until he arrived in Des Moines and saw Mr. McKnight; (2) after being told by both Mr. McKnight and Mr. Kelly that Petitioner was not to be questioned until he reached Des Moines; (3) after refusing to allow Mr. Kelly, whom Detective Leaming himself regarded as Petitioner's co-counsel, to ride to Des Moines with Petitioner; and (4) after being told by Petitioner that he would talk *after* he reached Des Moines and Mr. McKnight. By violating or ignoring these several, clear indications that Petitioner was to have counsel during interrogation, Detective Leaming deprived Petitioner of his right to counsel in a way similar to, if not more objectionable than, that utilized against the defendant in *Massiah* [v. *United States*, 377 U. S. 201 (1964)]." 375 F. Supp., at 177 (footnote omitted).

ions—for disagreeing with the conclusion of the District Court that "the State has produced no affirmative evidence whatsoever to support its claim of waiver." 375 F. Supp., at 183.

The dissenting opinion of THE CHIEF JUSTICE states that the Court's holding today "conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present." *Post*, at 419. I find no justification for this view. On the contrary, the opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel. *Ante*, at 405–406. We would have such a case here if petitioner had proved that the police officers refrained from coercion and interrogation, as they had agreed, and that Williams freely on his own initiative had confessed the crime.

II

In discussing the exclusionary rule, the dissenting opinion of THE CHIEF JUSTICE refers to *Stone* v. *Powell*, 428 U. S. 465 (1976), decided last Term. In that case, we held that a federal court need not apply the exclusionary rule on habeas corpus review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.

This case also involves review on habeas corpus of a state conviction, and the decisions that the Court today affirms held that Williams' incriminating statements should have been excluded.[2] As *Stone* was decided subsequently to these

[2] I tend generally to share the view that the *per se* application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 267 (1973) (POWELL, J., concurring). I therefore have indicated, at least with respect to Fourth Amendment violations,

decisions, the courts below had no occasion to consider whether the principle enunciated in *Stone* may have been applicable in this case. That question has not been presented in the briefs or arguments submitted to us,[3] and we therefore have no occasion to consider the possible applicability of *Stone*. The applicability of the rationale of *Stone* in the Fifth and Sixth Amendment context raises a number of unresolved issues. Many Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the factfinding process. In contrast, Fourth Amendment claims uniformly involve evidence that is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone* v. *Powell*, *supra*, at 490. Whether the rationale of *Stone* should be applied to those Fifth and Sixth Amendment claims or classes of claims that more closely parallel claims under the Fourth Amendment is a question as to which I intimate no view, and which should be resolved only after the implications of such a ruling have been fully explored.

MR. JUSTICE STEVENS, concurring.

MR. JUSTICE STEWART, in his opinion for the Court which I join, MR. JUSTICE POWELL, and MR. JUSTICE MARSHALL have

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that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. *Brown* v. *Illinois*, 422 U. S. 590, 610–612 (1975) (concurring opinion). Here, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement. Police are to be commended for diligent efforts to ascertain the truth, but the police conduct in this case plainly violated respondent's constitutional rights.

[3] The *Stone* issue was not mentioned in any of the briefs, including petitioner's reply brief filed September 29, 1976—some three months after our decision in *Stone* was announced. The possible relevance of *Stone* was raised by a question from the bench during oral argument. This prompted brief comments by counsel for both parties. Tr. of Oral Arg., 26–27, 49–50. But in no meaningful sense can the issue be viewed as having been "argued" in this case.

accurately explained the reasons why the law requires the result we reach today. Nevertheless, the strong language in the dissenting opinions prompts me to add this brief comment about the Court's function in a case such as this.

Nothing that we write, no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy or undo the consequences of the official neglect which led to the respondent's escape from a state mental institution. The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us.

Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage—as in countless others in which the law profoundly affects the life of the individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.*

MR. CHIEF JUSTICE BURGER, dissenting.

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It con-

*The importance of this point is emphasized by the State's refusal to permit counsel to accompany his client on the trip from Davenport to Des Moines.

tinues the Court—by the narrowest margin—on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

Williams is guilty of the savage murder of a small child; no member of the Court contends he is not. While in custody, and after no fewer than *five* warnings of his rights to silence and to counsel, he led police to the concealed body of his victim. The Court concedes Williams was not threatened or coerced and that he spoke and acted voluntarily and with full awareness of his constitutional rights. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—the jury must not be told how the police found the body.

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.[1] In so ruling

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[1] "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People* v. *Defore*, 242 N. Y. 13, 21, 23–24, 150 N. E. 585, 587, 588 (1926).

The Court protests, *ante*, at 407 n. 12, that its holding excludes only "Williams' incriminating statements themselves [as well as] any testimony describing his having led the police to the victim's body," thus hinting that successful retrial of this palpably guilty felon is realistically possible. Even if this were all, and the *corpus delicti* could be used to establish the fact and manner of the victim's death, the Court's holding clearly bars all efforts to let the jury know how the police found the body. But the Court's further—and remarkable—statement that "evidence of where the body was found and of its condition" could be admitted *only* "on the theory that the body would have been discovered in any event" makes

the Court regresses to playing a grisly game of "hide and seek," once more exalting the sporting theory of criminal justice which has been experiencing a decline in our jurisprudence. With JUSTICES WHITE, BLACKMUN, and REHNQUIST, I categorically reject the remarkable notion that the police in this case were guilty of unconstitutional misconduct, or any conduct justifying the bizarre result reached by the Court. Apart from a brief comment on the merits, however, I wish to focus on the irrationality of applying the increasingly discredited exclusionary rule to this case.

(1)

The Court Concedes Williams' Disclosures Were Voluntary

Under well-settled precedents which the Court freely acknowledges, it is very clear that Williams had made a valid waiver of his Fifth Amendment right to silence and his Sixth Amendment right to counsel when he led police to the child's body. Indeed, even under the Court's analysis I do not understand how a contrary conclusion is possible.

The Court purports to apply as the appropriate constitutional waiver standard the familiar "intentional relinquishment or abandonment of a known right or privilege" test of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). *Ante*, at 404. The Court assumes, without deciding, that Williams' conduct and statements were voluntary. It concedes, as it must, *ibid.*, that Williams had been informed of and fully understood his constitutional rights and the consequences of their waiver. Then, having either assumed or found every element necessary to make out a valid waiver under its own test, the

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clear that the Court is determined to keep the truth from the jurors pledged to find the truth. If all use of the *corpus delicti* is to be barred by the Court as "fruit of the poisonous tree" under *Wong Sun* v. *United States*, 371 U. S. 471 (1963), except on the unlikely theory suggested by the Court, the Court renders the prospects of doing justice in this case exceedingly remote.

Court reaches the astonishing conclusion that no valid waiver has been demonstrated.

This remarkable result is compounded by the Court's failure to define what evidentiary showing the State failed to make. Only recently, in *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 238 n. 25 (1973), the Court analyzed the distinction between a voluntary act and the waiver of a right; there MR. JUSTICE STEWART stated for the Court:

> "[T]he question whether a person has acted 'voluntarily' is quite distinct from the question whether he has 'waived' a trial right. The former question, as we made clear in *Brady* v. *United States*, 397 U. S. [742,] 749, can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns on the extent of his knowledge."

Similarly, in *McMann* v. *Richardson*, 397 U. S. 759, 766 (1970), we said that since a guilty plea constituted a waiver of a host of constitutional rights, "it must be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.'" If the Court today applied these standards with fidelity to the *Schneckloth* and *McMann* holdings it could not reach the result now announced.

The evidence is uncontradicted that Williams had abundant knowledge of his right to have counsel present and of his right to silence. Since the Court does not question his mental competence, it boggles the mind to suggest that Williams could not understand that leading police to the child's body would have other than the most serious consequences. All of the elements necessary to make out a valid waiver are shown by the record and acknowledged by the Court; we thus are left to guess how the Court reached its holding.

One plausible but unarticulated basis for the result reached is that once a suspect has asserted his right not to talk without the presence of an attorney, it becomes legally impossible

for him to waive that right until he has seen an attorney. But constitutional rights are *personal*, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court's holding operates to "imprison a man in his privileges," *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942); it conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present. It denigrates an individual to a nonperson whose free will has become hostage to a lawyer so that until the lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to a waiver only by that individual.[2] The opinions in support of the Court's judgment do not enlighten us as to why police conduct—whether good or bad—should operate to suspend Williams' right to change his mind and "tell all" at once rather than waiting until he reached Des Moines.[3]

In his concurring opinion MR. JUSTICE POWELL suggests that the result in this case turns on whether Detective Leaming's remarks constituted "interrogation," as he views them, or whether they were "statements" intended to prick the conscience of the accused. I find it most remarkable that a murder case should turn on judicial interpretation that a statement becomes a question simply because it is followed by an

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[2] Such a paternalistic rule is particularly anomalous in the Sixth Amendment context, where this Court has only recently discovered an independent constitutional right of self-representation, allowing an accused the absolute right to proceed without a lawyer at trial, once he is aware of the consequences. *Faretta* v. *California*, 422 U. S. 806 (1975).

[3] Paradoxically, in light of the result reached, the Court acknowledges that Williams repeatedly stated: "When I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Read in context it is plain that Williams was saying he intended to confess. The Court then goes on to hold, in effect, that Williams could not change his mind until he reached Des Moines.

incriminating disclosure from the suspect. The Court seems to be saying that since Williams said he would "tell the whole story" at Des Moines, the police should have been content and waited; of course, that would have been the wiser course, especially in light of the nuances of constitutional jurisprudence applied by the Court, but a murder case ought not turn on such tenuous strands.

In any case, the Court assures us, *ante*, at 405–406, this is not at all what it intends, and that a valid waiver was *possible* in these circumstances, but was not quite made. Here, of course, Williams did not confess to the murder in so many words; it was his conduct in guiding police to the body, not his words, which incriminated him. And the record is replete with evidence that Williams knew precisely what he was doing when he guided police to the body. The human urge to confess wrongdoing is, of course, normal in all save hardened, professional criminals, as psychiatrists and analysts have demonstrated. T. Reik, The Compulsion to Confess (1972).

(2)

The Exclusionary Rule Should Not be Applied to Non-egregious Police Conduct

Even if there was no waiver, and assuming a technical violation occurred, the Court errs gravely in mechanically applying the exclusionary rule without considering whether that Draconian judicial doctrine should be invoked in these circumstances, or indeed whether any of its conceivable goals will be furthered by its application here.

The obvious flaws of the exclusionary rule as a judicial remedy are familiar. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 411 (1971) (BURGER, C. J., dissenting); *Stone* v. *Powell*, 428 U. S. 465, 498–502 (1976) (BURGER, C. J., concurring); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970); Williams, The Exclusionary Rule Under Foreign Law—Eng-

land, 52 J. Crim. L. 272 (1961). Today's holding interrupts what has been a more rational perception of the constitutional and social utility of excluding reliable evidence from the truth-seeking process. In its Fourth Amendment context, we have now recognized that the exclusionary rule is in no sense a *personal* constitutional right, but a judicially conceived remedial device designed to safeguard and effectuate guaranteed legal rights generally. *Stone* v. *Powell, supra,* at 482; *United States* v. *Janis,* 428 U. S. 433, 443–447 (1976); *United States* v. *Calandra,* 414 U. S. 338, 347–348 (1974); see *Alderman* v. *United States,* 394 U. S. 165, 174–175 (1969). We have repeatedly emphasized that deterrence of unconstitutional or otherwise unlawful police conduct is the only valid justification for excluding reliable and probative evidence from the criminal factfinding process. *Stone* v. *Powell, supra,* at 485–486; *United States* v. *Janis, supra,* at 446, 458–459, n. 35; *United States* v. *Peltier,* 422 U. S. 531, 536–539 (1975).

Accordingly, unlawfully obtained evidence is not automatically excluded from the factfinding process in all circumstances.[4] In a variety of contexts we inquire whether ap-

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[4] One familiar example of this Court's unwillingness to apply the prophylactic exclusionary rule beyond its natural scope is the requirement that evidence seized in violation of the rights of another person may not be challenged by a defendant whose own rights were not invaded. *Alderman* v. *United States,* 394 U. S. 165, 174–175 (1969).

Another is the rule that the "taint" of a constitutional violation may be vitiated by later events so that evidence which would not have been obtained but for the constitutional violation may yet be admissible. *Wong Sun* v. *United States,* 371 U. S. 471 (1963); see *Brown* v. *Illinois,* 422 U. S. 590 (1975).

Both these limitations on the use of the exclusionary rule are inconsistent with its deterrent rationale. If courts wished to enhance the deterrent effect on law enforcement officers, all evidence whose seizure could be traced directly to any constitutional violation would be suppressed. It is evident that our refusal to expand the rule in this fashion represents a considered balancing between "the additional benefits of extending the exclusionary rule" and "the public interest in prosecuting those ac-

plication of the rule will promote its objectives sufficiently to justify the enormous cost it imposes on society. "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra, supra,* at 348; accord, *Stone* v. *Powell, supra,* at 486–491; *United States* v. *Janis, supra; Brown* v. *Illinois,* 422 U. S. 590, 606, 608–609 (1975) (POWELL, J., concurring in part); *United States* v. *Peltier, supra,* at 538–539.

This is, of course, the familiar balancing process applicable to cases in which important competing interests are at stake. It is a recognition, albeit belated, that "the policies behind the exclusionary rule are not absolute," *Stone* v. *Powell, supra,* at 488. It acknowledges that so serious an infringement of the crucial truth-seeking function of a criminal prosecution should be allowed only when imperative to safeguard constitutional rights. An important factor in this amalgam is whether the violation at issue may properly be classed as "egregious." *Brown* v. *Illinois, supra,* at 609 (POWELL, J., concurring in part). The Court understandably does not try to characterize the police actions here as "egregious."

Against this background, it is striking that the Court fails even to consider whether the benefits secured by application of the exclusionary rule in this case outweigh its obvious social costs. Perhaps the failure is due to the fact that this case arises not under the Fourth Amendment, but under *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and the Sixth Amendment right to counsel. The Court apparently perceives the function of the exclusionary rule to be so different in these varying contexts that it must be mechanically and uncriti-

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cused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States, supra,* at 175; see *United States* v. *Calandra,* 414 U. S. 338, 348 (1974).

cally applied in all cases arising outside the Fourth Amendment.[5]

But this is demonstrably not the case where police conduct collides with *Miranda*'s procedural safeguards rather than with the Fifth Amendment privilege against compulsory self-incrimination. Involuntary and coerced admissions are suppressed because of the inherent unreliability of a confession wrung from an unwilling suspect by threats, brutality, or other coercion. *Schneckloth* v. *Bustamonte*, 412 U. S., at 242; *Linkletter* v. *Walker*, 381 U. S. 618, 638 (1965); *Stone* v. *Powell*, 428 U. S., at 496–497 (BURGER, C. J., concurring); *Kaufman* v. *United States*, 394 U. S. 217, 237 (1969) (Black, J., dissenting). We can all agree on "'[t]he abhorrence of society to the use of involuntary confessions,'" *Linkletter* v. *Walker*, *supra*, at 638, and the need to preserve the integrity of the human personality and individual free will. *Ibid.*; *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207 (1960).

But use of Williams' disclosures and their fruits carries no risk whatever of unreliability, for the body was found where he said it would be found. Moreover, since the Court makes no issue of voluntariness, no dangers are posed to individual dignity or free will. *Miranda*'s safeguards are premised on presumed unreliability long associated with confessions extorted by brutality or threats; they are not personal constitutional rights, but are simply judicially created prophylactic measures. *Michigan* v. *Tucker*, 417 U. S. 433 (1974); *Doyle*

[5] Indeed, if this were a Fourth Amendment case our course would be clear; only last Term, in *Stone* v. *Powell*, we held that application of the exclusionary rule in federal habeas corpus has such a minimal deterrent effect on law enforcement officials that habeas relief should not be granted on the ground that unconstitutionally seized evidence was introduced at trial. Since the quantum of deterrence provided by federal habeas does not vary with the constitutional provision at issue, it appears that the Court sees fundamental, though unarticulated, differences in the exclusionary sanction when it is applied in other contexts.

v. *Ohio*, 426 U. S. 610, 617 (1976); *Brown* v. *Illinois*, *supra*, at 606 (POWELL, J., concurring in part).

Thus, in cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the *Miranda* prophylaxes, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. . . . We also 'must consider society's interest in the effective prosecution of criminals . . . .'" *Michigan* v. *Tucker*, *supra*, at 450.[6] This individualized consideration or balancing process with respect to the exclusionary sanction is possible in this case, as in others, because Williams' incriminating disclosures are not infected with any element of compulsion the Fifth Amendment forbids; nor, as noted earlier, does this evidence pose any danger of unreliability to the factfinding process. In short, there is no reason to exclude this evidence.

Similarly, the exclusionary rule is not uniformly implicated in the Sixth Amendment, particularly its pretrial aspects. We have held that

> "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973).

Thus, the right to counsel is fundamentally a "trial" right necessitated by the legal complexities of a criminal prosecu-

[6] Statements obtained in violation of *Miranda* have long been used for impeachment purposes. *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Harris* v. *New York*, 401 U. S. 222 (1971). See also *Walder* v. *United States*, 347 U. S. 62 (1954).

tion and the need to offset, to the trier of fact, the power of the State as prosecutor. See *Schneckloth* v. *Bustamonte, supra,* at 241. It is now thought that modern law enforcement involves pretrial confrontations at which the defendant's fate might effectively be sealed before the right of counsel could attach. In order to make meaningful the defendant's opportunity to a fair trial and to assistance of counsel at that trial—the core purposes of the counsel guarantee—the Court formulated a *per se* rule guaranteeing counsel at what it has characterized as "critical" pretrial proceedings where substantial rights might be endangered. *United States* v. *Wade,* 388 U. S. 218, 224–227 (1967); *Schneckloth* v. *Bustamonte, supra,* at 238–239.

As we have seen in the Fifth Amendment setting, violations of prophylactic rules designed to safeguard other constitutional guarantees and deter impermissible police conduct need not call for the automatic suppression of evidence without regard to the purposes served by exclusion; nor do Fourth Amendment violations merit uncritical suppression of evidence. In other situations we decline to suppress eyewitness identifications which are the products of unnecessarily suggestive lineups or photo displays unless there is a "very substantial likelihood of irreparable misidentification." *Simmons* v. *United States,* 390 U. S. 377, 384 (1968). Recognizing that "[i]t is the likelihood of misidentification which violates a defendant's right to due process," *Neil* v. *Biggers,* 409 U. S. 188, 198 (1972), we exclude evidence only when essential to safeguard the integrity of the truth-seeking process. The test, in short, is the reliability of the evidence.

So, too, in the Sixth Amendment sphere failure to have counsel in a pretrial setting should not lead to the "knee-jerk" suppression of relevant and reliable evidence. Just as even uncounseled "critical" pretrial confrontations may often be conducted fairly and not in derogation of Sixth Amendment values, *Stovall* v. *Denno,* 388 U. S. 293, 298–299 (1967), evi-

dence obtained in such proceedings should be suppressed only when its use would imperil the core values the Amendment was written to protect. Having extended Sixth Amendment concepts originally thought to relate to the trial itself to earlier periods when a criminal investigation is focused on a suspect, application of the drastic bar of exclusion should be approached with caution.

In any event, the fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process.[7] In this case, where the evidence of how the child's body was found is of unquestioned reliability, and since the Court accepts Williams' disclosures as voluntary and uncoerced, there is no issue either of fairness or evidentiary reliability to justify suppression of truth. It appears suppression is mandated here for no other reason than the Court's general impression that it may have a beneficial effect on future police conduct; indeed, the Court fails to say even that much in defense of its holding.

Thus, whether considered under *Miranda* or the Sixth Amendment, there is no more reason to exclude the evidence in this case than there was in *Stone* v. *Powell;*[8] that holding was

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[7] Indeed, we determine whether pretrial proceedings are "critical" by asking whether counsel is there needed to protect the fairness of the trial. See *United States* v. *Ash,* 413 U. S. 300, 322 (1973) (STEWART, J., concurring); *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 239 (1973). It is also clear that the danger of factual error was the moving force behind the counsel guarantee in such cases as *United States* v. *Wade,* 388 U. S. 218 (1967) (post-indictment lineups).

[8] This is a far cry from *Massiah* v. *United States,* 377 U. S. 201 (1964). Massiah's statements had no independent indicia of reliability as do respondent's. Moreover, Massiah was unaware that he was being interrogated by ruse and had not been advised of his right to counsel.

Here, as MR. JUSTICE BLACKMUN has noted, there was no interrogation of Williams in the sense that term was used in *Massiah, Escobedo* v. *Illinois,* 378 U. S. 478 (1964), or *Miranda.* That the detective's statement appealed to Williams' conscience is not a sufficient reason to equate it to a police station grilling. It could well be that merely driving on the road

premised on the utter reliability of evidence sought to be suppressed, the irrelevancy of the constitutional claim to the criminal defendant's factual guilt or innocence, and the minimal deterrent effect of habeas corpus on police misconduct. This case, like *Stone* v. *Powell,* comes to us by way of habeas corpus after a fair trial and appeal in the state courts. Relevant factors in this case are thus indistinguishable from those in *Stone,* and from those in other Fourth Amendment cases suggesting a balancing approach toward utilization of the exclusionary sanction. Rather than adopting a formalistic analysis varying with the constitutional provision invoked,[9] we should apply the exclusionary rule on the basis of its benefits and costs, at least in those cases where the police conduct at issue is far from being outrageous or egregious.

In his opinion, MR. JUSTICE POWELL intimates that he agrees there is little sense in applying the exclusionary sanction where the evidence suppressed is " 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.' " *Ante,* at 414. Since he seems to concede that the evidence in question is highly reliable and probative, his joining the Court's opinion can be explained only by an insistence that the "question has not been presented in the briefs or arguments submitted to us." *Ibid.* But petitioner has directly challenged the applicability of the exclusionary rule to this case, Brief for Petitioner 31–32, and has invoked principles of comity and federalism against reversal of the conviction. *Id.,* at 69–73. Moreover, at oral argument—the first opportunity to do so—petitioner argued

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and passing the intersection where he had turned off to bury the body might have produced the same result without any suggestive comments.

[9] Clearly there will be many cases where evidence obtained in violation of right-to-counsel rules is inadmissible, either for reasons related to the normative purposes of the Sixth Amendment or to the deterrence of unlawful police conduct. But this is, on the Court's facts, not such a case, and it hardly furthers reasoned analysis to lump it into an undifferentiated conceptual category for reasons which do not apply to it.

that our intervening decision in *Stone* v. *Powell* should be extended to this case, just as respondent argued that it should not. Tr. of Oral Arg. 26–27, 49–50.

At the least, if our intervening decision in *Stone* makes application of the exclusionary rule in this case an open question which "should be resolved only after the implications of such a ruling have been fully explored," the plainly proper course is to vacate the judgment of the Court of Appeals and remand the case for reconsideration in light of that case. Indeed, only recently we actually applied the intervening decision of *Washington* v. *Davis*, 426 U. S. 229 (1976), to resolve the constitutional issue in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). There, we found no difficulty in applying the intervening holding ourselves without a remand to give the Court of Appeals an opportunity to reconsider its holding; we reached the correct result directly, over MR. JUSTICE WHITE'S dissent urging a remand. Today, the Court declines either to apply the intervening case of *Stone* v. *Powell*, which MR. JUSTICE POWELL admits may well be controlling, or to remand for reconsideration in light of that case; this is all the more surprising since MR. JUSTICE POWELL wrote *Stone* v. *Powell* and today makes the fifth vote for the Court's judgment.

The bizarre result reached by the Court today recalls Mr. Justice Black's strong dissent in *Kaufman* v. *United States*, 394 U. S., at 231. There, too, a defendant sought release after his conviction had been affirmed on appeal. There, as here, the defendant's guilt was manifest, and was not called into question by the constitutional claims presented. This Court granted relief because it thought reliable evidence had been unconstitutionally obtained. Mr. Justice Black's reaction, foreshadowing our long overdue holding in *Stone* v. *Powell*, serves as a fitting conclusion to the views I have expressed:

> "It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of

> the guilty is desirable, other things being equal. One commentator, who attempted in vain to dissuade this Court from today's holding, thought it necessary to point out that there is 'a strong public interest in convicting the guilty.' . . .
>
> ". . . I would not let any criminal conviction become invulnerable to collateral attack where there is left remaining the probability or possibility that constitutional commands related to the integrity of the fact-finding process have been violated. In such situations society has failed to perform its obligation to prove beyond a reasonable doubt that the defendant committed the crime. But it is quite a different thing to permit collateral attack on a conviction after a trial according to due process when the defendant clearly is, by the proof and by his own admission, guilty of the crime charged. . . . In collateral attacks whether by habeas corpus or by § 2255 proceedings, I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt. This defendant is permitted to attack his conviction collaterally although he conceded at the trial and does not now deny that he had robbed the savings and loan association and although the evidence makes absolutely clear that he knew what he was doing. Thus, his guilt being certain, surely he does not have a constitutional right to get a new trial. I cannot possibly agree with the Court." 394 U. S., at 240–242.

Like Mr. Justice Black in *Kaufman*, I cannot possibly agree with the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

The respondent in this case killed a 10-year-old child. The majority sets aside his conviction, holding that certain

statements of unquestioned reliability were unconstitutionally obtained from him, and under the circumstances probably makes it impossible to retry him. Because there is nothing in the Constitution or in our previous cases which requires the Court's action, I dissent.

I

The victim in this case disappeared from a YMCA building in Des Moines, Iowa, on Christmas Eve in 1968. Respondent was seen shortly thereafter carrying a bundle wrapped in a blanket from the YMCA to his car. His car was found in Davenport, Iowa, 160 miles away on Christmas Day. A warrant was then issued for his arrest. On the day after Christmas respondent surrendered himself voluntarily to local police in Davenport where he was arraigned. The Des Moines police, in turn, drove to Davenport, picked respondent up and drove him back to Des Moines. During the trip back to Des Moines respondent made statements evidencing his knowledge of the whereabouts of the victim's clothing and body and leading the police to the body. The statements were, of course, made without the presence of counsel since no counsel was in the police car. The issue in this case is whether respondent—who was entitled not to make any statements to the police without consultation with and/or presence of counsel [1]—validly waived those rights.

The relevant facts are as follows. Before the Des Moines police officers arrived in Davenport, respondent was twice advised, once by Davenport police and once by a judge, of his right to counsel under *Miranda* v. *Arizona*, 384 U. S.

[1] It does not matter whether the right not to make statements in the absence of counsel stems from *Massiah* v. *United States*, 377 U. S. 201 (1964), or *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In either case the question is one of waiver. Waiver was not addressed in *Massiah* because there the statements were being made to an informant and the defendant had no way of knowing that he had a right not to talk to him without counsel.

436 (1966). Respondent had in any event not only retained counsel prior to the arrival of the Des Moines police, but had consulted with that counsel on the subject of talking to the police. His attorney, Mr. McKnight, spoke with him from the Des Moines police office when respondent was in the Davenport police office. He advised respondent not to talk to the Des Moines police officers during the trip back to Des Moines, but told him that he was "going to have to tell the officers where she [the victim] is" when he arrived in Des Moines. Respondent also consulted with a lawyer in Davenport, who also advised him against talking to the police during the ride back to Des Moines. Thus, prior to the arrival of the Des Moines police, respondent had been effectively informed by at least four people that he need not talk to the police in the absence of counsel during his trip to Des Moines. Then, when the Des Moines police arrived, one of them advised respondent, *inter alia*, "that he had a right to an attorney present during any questioning." The Des Moines police officer asked respondent: "[D]o you fully understand that?" Respondent said that he did. The officer then "advised him that [the officer] wanted him to be sure to remember what [the officer] had just told him because it was a long ride back to Des Moines and he and [the officer] would be visiting." Respondent then consulted again with the Davenport attorney, who advised him not to make any statements to the police officers and so informed the officers—directing them not to question him. After this series of warnings by two attorneys, two sets of police officers, and a judge, the trip to Des Moines commenced.

Sometime early in the trip one of the officers, Detective Leaming, said:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visi-

> bility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Respondent asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines. Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." On several occasions during the trip, respondent told the officers that he would tell them the whole story when he got to Des Moines and saw Mr. McKnight—an indication that he knew he was entitled to wait until his counsel was present before talking to the police.[2]

[2] The record does not make it crystal clear that these statements, or some of them, *followed* the above-quoted statements by Detective Leaming. However, the record reveals that Leaming's statement was made not long after leaving Davenport and that respondent's statement that he would tell the whole story when they arrived in Des Moines was made "several times." It is reasonable to infer that respondent's statement followed that by Leaming. During some of the rest of the trip respondent asked questions of the officers about the investigation, about how they would treat him, and about a number of subjects unrelated to the case.

Some considerable time thereafter,[3] without any prompting on the part of any state official so far as the record reveals, respondent asked whether the police had found the victim's shoes. The subject of the victim's clothing had never been broached by the police nor suggested by anything the police had said. So far as the record reveals, the subject was suggested to respondent solely by the fact that the police car was then about to pass the gas station where respondent had hidden the shoes. When the police said they were unsure whether they had found the shoes, respondent directed them to the gas station. When the car continued on its way to Des Moines, responded asked whether the blanket had been found. Once again this subject had not previously been broached. Respondent directed the officers to a rest area where he had left the blanket. When the car again continued, respondent said that he would direct the officers to the victim's body, and he did so.

II

The strictest test of waiver which might be applied to this case is that set forth in *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), and quoted by the majority, *ante*, at 404. In order to show that a right has been waived under this test, the State must prove "an intentional relinquishment or abandonment of a known right or privilege." The majority creates no new rule preventing an accused who has retained a lawyer from waiving his right to the lawyer's presence during questioning. The majority simply finds that no waiver was *proved* in this case. I disagree. That respondent knew of his right not to say anything to the officers without advice and presence of counsel is established on this record to a moral

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[3] The trip was 160 miles long and was made in bad weather. Leaming's statement was made shortly after leaving Davenport. Respondent's statements about the victim's clothes were made shortly before arriving in Mitchellville, a near suburb of Des Moines.

certainty. He was advised of the right by three officials of the State—telling at least one that he understood the right—and by two lawyers.[4] Finally, he further demonstrated his knowledge of the right by informing the police that he would tell them the story in the presence of McKnight when they arrived in Des Moines. The issue in this case, then, is whether respondent relinquished that right intentionally.

Respondent relinquished his right not to talk to the police about his crime when the car approached the place where he had hidden the victim's clothes. Men usually intend to do what they do, and there is nothing in the record to support the proposition that respondent's decision to talk was anything but an exercise of his own free will. Apparently, without any prodding from the officers, respondent—who had earlier said that he would tell the whole story when he arrived in Des Moines—spontaneously changed his mind about the timing of his disclosures when the car approached the places where he had hidden the evidence. However, even if his statements were influenced by Detective Leaming's above-quoted statement, respondent's decision to talk in the absence of counsel can hardly be viewed as the product of an overborne will. The statement by Leaming was not coercive; it was accompanied by a request that respondent not respond to it; and it was delivered hours before respondent decided to make any statement. Respondent's waiver was thus knowing and intentional.

The majority's contrary conclusion seems to rest on the fact that respondent "asserted" his right to counsel by retaining and consulting with one lawyer and by consulting with another. How this supports the conclusion that respondent's later relinquishment of his right not to talk in the

[4] Moreover, he in fact received advice of counsel on at least two occasions on the question whether he should talk to the police on the trip to Des Moines.

absence of counsel was unintentional is a mystery. The fact that respondent consulted with counsel on the question whether he should talk to the police in counsel's absence makes his later decision to talk in counsel's absence *better* informed and, if anything, more intelligent.

The majority recognizes that even after this "assertion" of his right to counsel, it would have found that respondent waived his right not to talk in counsel's absence if his waiver had been express—*i. e.*, if the officers had asked him in the car whether he would be willing to answer questions in counsel's absence and if he had answered "yes." *Ante*, at 405. But waiver is not a formalistic concept. Waiver is shown whenever the facts establish that an accused knew of a right and intended to relinquish it. Such waiver, even if not express,[5] was plainly shown here. The only other con-

[5] The Courts of Appeals, in administering the rule of *Miranda* v. *Arizona*, have not required an express waiver of the rights to silence and to counsel which an accused must be advised about under that case. Waiver has been found where the accused is informed of those rights, understands them, and then proceeds voluntarily to answer questions in the absence of counsel. *United States* v. *Marchildon*, 519 F. 2d 337, 343 (CA8 1975) ("Waiver depends on no form of words, written or oral. It is to be determined from all of the surrounding circumstances. Addressing ourselves to this issue we held in *Hughes* v. *Swenson*, 452 F. 2d 866, 867–868 (CA8 1971), that: 'The thrust of appellant's claim is that a valid waiver cannot be effective absent an expressed declaration to that effect. We are cited to no case which supports appellant's thesis and independent research discloses none. To the contrary, the Fifth, Seventh, Ninth, and Tenth Circuits have held in effect that if the defendant is effectively advised of his rights and intelligently and understandingly declines to exercise them, the waiver is valid' "); *United States* v. *Ganter*, 436 F. 2d 364, 370 (CA7 1970) ("[A]n express statement that the individual does not want a lawyer is not required if it appears that the defendant was effectively advised of his rights and he then intelligently and understandingly declined to exercise them"); *United States* v. *James*, 528 F. 2d 999, 1019 (CA5 1976) (" 'All that the prosecution must show is that the defendant was effectively advised of his rights and that he then intelligently and understandingly declined to exercise them' "); *Blackmon* v. *Blackledge*,

ceivable basis for the majority's holding is the implicit suggestion, *ante*, at 400–401, that the right involved in *Massiah* v. *United States*, 377 U. S. 201 (1964), as distinguished from the right involved in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), is a right not to be *asked* any questions in counsel's absence rather than a right not to *answer* any questions in counsel's absence, and that the right not to be *asked* questions must be waived *before* the questions are asked. Such wafer-thin distinctions cannot determine whether a guilty murderer should go free. The only conceivable purpose for the presence of counsel during questioning is to protect an accused from making incriminating *answers*. Questions, unanswered, have no significance at all. Absent coercion [6]—no matter how the

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541 F. 2d 1070, 1072 (CA4 1976) ("[H]e was reasonably questioned only after having been fully informed of his rights and permitted to make a telephone call. Under such circumstances, a suspect's submission to questioning without objection and without requesting a lawyer is clearly a waiver of his right to counsel, if, indeed, he understands his rights"); *United States* v. *Boston*, 508 F. 2d 1171 (CA2 1974); *United States* v. *Johnson*, 466 F. 2d 1206 (CA8 1972); *Mitchell* v. *United States*, 140 U. S. App. D. C. 209, 434 F. 2d 483 (1970); *Bond* v. *United States*, 397 F. 2d 162 (CA10 1968).

There is absolutely no reason to require an additional question to the already cumbersome *Miranda* litany just because the majority finds another case—*Massiah* v. *United States*—providing exactly the same right to counsel as that involved in *Miranda*. In either event, the issue is, as the majority recognizes, one of the proof necessary to establish waiver. If an intentional relinquishment of the right to counsel under *Miranda* is established by proof that the accused was informed of his right and then voluntarily answered questions in counsel's absence, then similar proof establishes an intentional relinquishment of the *Massiah* right to counsel.

[6] There is a rigid prophylactic rule set forth in *Miranda* v. *Arizona* that once an arrestee requests presence of counsel at questioning, *questioning* must cease. The rule depends on an indication by the *accused* that he will be unable to handle the decision whether or not to answer questions without advice of counsel, see *Michigan* v. *Mosley*, 423 U. S. 96, 110 n. 2 (1975) (WHITE, J., concurring), and is inapplicable to this case

right involved is defined—an accused is amply protected by a rule requiring waiver before or simultaneously with the giving by him of an answer or the making by him of a statement.

III

The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man—the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *White* v. *Maryland*, 373 U. S. 59 (1963); *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); *Coleman* v. *Alabama*, 399 U. S. 1

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for two reasons. First, at no time did *respondent* indicate a desire not to be asked questions outside the presence of his counsel—notwithstanding the fact that he was told that he and the officers would be "visiting in the car." The majority concludes, although studiously avoiding reliance on *Miranda*, that respondent *asserted* his right to counsel. This he did in some respects, but he never, himself, asserted a right not to be questioned in the absence of counsel. Second, as is noted in the dissenting opinion of MR. JUSTICE BLACKMUN, respondent was not questioned. The rigid prophylactic rule—as the majority implicitly recognizes—is designed solely to prevent involuntary waivers of the right against self-incrimination and is not to be applied to a statement by a law enforcement officer accompanied by a request by the officer that the accused make no response followed by more than an hour of silence and an apparently spontaneous statement on a subject—the victim's shoes—not broached in the "speech." Under such circumstances there is not even a small risk that the waiver will be involuntary.

(1970); and *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). But see *Massiah* v. *United States*, *supra*. The police did nothing "wrong," let alone anything "unconstitutional." To anyone not lost in the intricacies of the prophylactic rules of *Miranda* v. *Arizona*, the result in this case seems utterly senseless; and for the reasons stated in Part II, *supra*, even applying those rules as well as the rule of *Massiah* v. *United States*, *supra*, the statements made by respondent were properly admitted. In light of these considerations, the majority's protest that the result in this case is justified by a "clear violation" of the Sixth and Fourteenth Amendments has a distressing hollow ring. I respectfully dissent.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

The State of Iowa, and 21 States and others, as *amici curiae*, strongly urge that this Court's procedural (as distinguished from constitutional) ruling in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), be re-examined and overruled. I, however, agree with the Court, *ante*, at 397, that this is not now the case in which that issue need be considered.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah* v. *United States*, 377 U. S. 201 (1964), that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Ante*, at 399, and POWELL, J., concurring, *ante*, at 410–413. I cannot regard that as unconstitutional *per se*.

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the

assistance of counsel. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). The isolation in this case was a necessary incident of transporting Williams to the county where the crime was committed.[1]

Second, Leaming's purpose was not solely to obtain incriminating evidence. The victim had been missing for only two days, and the police could not be certain that she was dead. Leaming, of course, and in accord with his duty, was "hoping to find out where that little girl was," *ante*, at 399, but such motivation does not equate with an intention to evade the Sixth Amendment.[2] Moreover, the Court seems to me to place an undue emphasis, *ante*, at 392, 400, and aspersion on what it and the lower courts have chosen to call the "Christian burial speech," and on Williams' "deeply religious" convictions.

Third, not every attempt to elicit information should be regarded as "tantamount to interrogation," *ante*, at 400. I am not persuaded that Leaming's observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams. Contrary to this Court's statement, *ibid.*, the Iowa Supreme Court appears to me to have thought and held otherwise, *State* v. *Williams*, 182 N. W. 2d 396, 403–405 (1970), and I agree. Williams, after all, was counseled by lawyers, and warned by the arraigning judge in Davenport and by the

[1] Neither attorney McKnight nor attorney Kelly objected to Williams' being returned to Des Moines, although each sought assurance that he would not be interrogated. That "the entire setting was conducive to . . . psychological coercion," POWELL, J., concurring, *ante*, at 412, was more attributable to Williams' flight from Des Moines than to any machinations of the police. Surely the police are not to be blamed for the facts that the murder was committed on Christmas Eve and that the weather was ominous.

[2] Indeed, Williams already had promised Leaming that he would tell "the whole story" when he reached Des Moines. *Ante*, at 392.

police, and yet it was he who started the travel conversations and brought up the subject of the criminal investigation. Without further reviewing the circumstances of the trip, I would say it is clear there was no interrogation. In this respect, I am in full accord with Judge Webster in his vigorous dissent, 509 F. 2d 227, 234–237, and with the views implicitly indicated by Chief Judge Gibson and Judge Stephenson, who joined him in voting for rehearing en banc.

In summary, it seems to me that the Court is holding that *Massiah* is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment. Such a rule is far too broad. Persons in custody frequently volunteer statements in response to stimuli other than interrogation. See, *e. g.*, *United States* v. *Cook*, 530 F. 2d 145, 152–153 (CA7), cert. denied, 426 U. S. 909 (1976) (defendant engaged officers in conversation while being transported to magistrate); *United States* v. *Martin*, 511 F. 2d 148, 150–151 (CA8 1975) (agent initiated conversation with suspect, provoking damaging admission); *United States* v. *Menichino*, 497 F. 2d 935, 939–941 (CA5 1974) (incriminating statements volunteered during booking process); *Haire* v. *Sarver*, 437 F. 2d 1262 (CA8), cert. denied, 404 U. S. 910 (1971) (statements volunteered in response to questioning of defendant's wife). When there is no interrogation, such statements should be admissible as long as they are truly voluntary.[3]

The *Massiah* point thus being of no consequence, I would vacate the judgment of the Court of Appeals and remand

[3] With all deference to the Court, I do not agree that *Massiah* regarded it as "constitutionally irrelevant" that the statements in that case were surreptitiously obtained, *ante*, at 400. The *Massiah* opinion quoted with approval the dissenting Circuit Judge's statement that "Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 377 U. S., at 206.

the case for consideration of the issue of voluntariness, in the constitutional sense, of Williams' statements, an issue the Court of Appeals did not reach when the case was before it.

One final word: I can understand the discomfiture the Court obviously suffers and expresses in Part IV of its opinion, *ante*, at 406, and the like discomfiture expressed by Justice (now United States District Judge) Stuart of the Iowa court in the dissent he felt compelled to make by this Court's precedents, 182 N. W. 2d, at 406. This was a brutal, tragic, and heinous crime inflicted upon a young girl on the afternoon of the day before Christmas. With the exclusionary rule operating as the Court effectuates it, the decision today probably means that, as a practical matter, no new trial will be possible at this date eight years after the crime, and that this respondent necessarily will go free. That, of course, is not the standard by which a case of this kind strictly is to be judged. But, as Judge Webster in dissent below observed, 509 F. 2d, at 237, placing the case in sensible and proper perspective: "The evidence of Williams' guilt was overwhelming. No challenge is made to the reliability of the fact-finding process." I am in full agreement with that observation.

ATLAS ROOFING CO., INC. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-746. Argued November 29, 1976—Decided March 23, 1977*

Upon finding that the existing state statutory remedies and common-law actions for negligence and wrongful death were inadequate to protect employees from death and injury due to unsafe working conditions, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA), under which a new statutory duty was imposed on employers to avoid maintaining unsafe working conditions. Two new remedies were provided by permitting the Federal Government, proceeding before an administrative agency, (1) to obtain abatement orders requiring employers to correct unsafe working conditions, and (2) to impose civil penalties on any employer maintaining any unsafe working condition. If an employer contests a penalty or abatement order, an evidentiary hearing is then held before an administrative law judge of the Occupational Safety and Health Review Commission (Commission), who is empowered to affirm, modify, or vacate the proposed abatement order and penalty. The judge's decision becomes the Commission's final, appealable order, subject to review by the full Commission. If such review is granted, the Commission's subsequent order directing abatement and payment of a penalty becomes final unless the employer petitions for judicial review in the appropriate court of appeals, but the Commission's findings of fact, if supported by substantial evidence, are conclusive. If the employer fails to pay the assessed penalty, the Secretary of Labor may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried. In the instant cases separate abatement orders were issued and penalties proposed against petitioners for violations of safety standards promulgated under OSHA. After hearings were held before Administrative Law Judges when petitioners each contested the orders

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*Together with No. 75-748, *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

and penalties, and the judges and later the Commission had affirmed the findings of violations and the abatement orders and had assessed penalties, petitioners sought judicial review in the Courts of Appeals, challenging both the Commission's factual findings that violations had occurred and the constitutionality of OSHA's enforcement procedures. Each Court of Appeals affirmed the Commission's orders over each petitioner's contention that the failure to afford the employer a jury trial on the question whether it had violated OSHA contravened the Seventh Amendment, which provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." *Held:* The Seventh Amendment does not prevent Congress from assigning to an administrative agency the task of adjudicating violations of OSHA. When Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." That Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases, but took the existing legal order as it found it, and hence there is little or no basis for now interpreting it as providing an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. The Amendment did not render Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within its power to regulate—so to create such new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law (such as an administrative agency) in which facts are not found by juries. Pp. 449–461.

No. 75–746, 518 F. 2d 990, and No. 75–748, 519 F. 2d 1200, affirmed.

WHITE, J., delivered the opinion of the Court, in which all Members joined, except BLACKMUN, J., who took no part in the decision of the cases.

McNeill Stokes argued the cause for petitioners in both cases. With him on the briefs were *Ira J. Smotherman, Jr., Herbert J. Miller, Jr., Nathan Lewin, Martin D. Minsker,* and *Oliver N. Hormell.*

Solicitor General Bork argued the cause for respondents in both cases. With him on the brief were *Assistant Attorney*

General Lee, Louis F. Claiborne, William J. Kilberg, and *Michael H. Levin.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in these cases is whether, consistent with the Seventh Amendment, Congress may create a new cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial.

I

After extensive investigation, Congress concluded, in 1970, that work-related deaths and injuries had become a "drastic" national problem.[1] Finding the existing state statutory rem-

†*Gerard C. Smetana, Jerry Kronenberg, Howard L. Mocerf, Lawrence B. Kraus,* and *Richard O'Brecht* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal in both cases.

Warren L. Johns, Philip B. Kurland, and *Alan L. Unikel* filed a brief for the Seventh-Day Adventist Church as *amicus curiae* urging affirmance in No. 75–748.

[1] The Senate Report stated:

"The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today. . . . 14,500 persons are killed annually as a result of industrial accidents; accordingly, during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes.

"In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.

"This 'grim current scene' . . . represents a worsening trend, for the fact is that the number of disabling injuries per million man hours worked

edies as well as state common-law actions for negligence and wrongful death to be inadequate to protect the employee population from death and injury due to unsafe working conditions, Congress enacted the Occupational Safety and Health Act of 1970 (OSHA or Act), 84 Stat. 1590, 29 U. S. C. § 651 *et seq.* The Act created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions, and empowers the Secretary of Labor to promulgate health and safety standards.[2] Two new remedies were provided—permitting the Federal Government, proceeding before an administrative agency, (1) to obtain abatement orders requiring employers to correct unsafe working conditions and (2) to impose civil penalties on any employer maintaining any unsafe working condition. Each remedy exists whether or not an employee is actually injured or killed as a result of the condition, and existing state statutory and common-law remedies for actual injury and death remain unaffected.

Under the Act, inspectors, representing the Secretary of

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is today 20% higher than in 1958." S. Rep. No. 91–1282, p. 2 (1970), Leg. Hist. 142.

See also H. R. Rep. No. 91–1291, pp. 14–15 (1970); Leg. Hist. 844–845 ("The issue of the health and safety of the American working man and woman is the most crucial one in the whole environmental question . . . the worst problem confronting American workers").

House and Senate debates are reprinted, along with the House, Senate, and Conference Reports, in a one-volume Committee Print entitled Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited *supra* and hereafter as Leg. Hist.).

[2] The statute provides in § 5 (a), 29 U. S. C. § 654 (a), that each employer:

"(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

"(2) shall comply with occupational safety and health standards promulgated under this Act."

Labor, are authorized to conduct reasonable safety and health inspections. 29 U. S. C. § 657 (a). If a violation is discovered, the inspector, on behalf of the Secretary, issues a citation to the employer fixing a reasonable time for its abatement and, in his discretion, proposing a civil penalty. §§ 658, 659. Such proposed penalties may range from nothing for *de minimis* and nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations, §§ 658 (a), 659 (a), 666 (a)–(c) and (j).

If the employer wishes to contest the penalty or the abatement order, he may do so by notifying the Secretary of Labor within 15 days, in which event the abatement order is automatically stayed. §§ 659 (a), (b), 666 (d). An evidentiary hearing is then held before an administrative law judge of the Occupational Safety and Health Review Commission. The Commission consists of three members, appointed for six-year terms, each of whom is qualified "by reason of training, education or experience" to adjudicate contested citations and assess penalties. §§ 651(3), 659 (c), 661, 666 (i). At this hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty; and the judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to "the size of the business of the employer . . . , the gravity of the violation, the good faith of the employer, and the history of previous violations." § 666 (i). The judge's decision becomes the Commission's final and appealable order unless within 30 days a Commissioner directs that it be reviewed by the full Commission.[3] §§ 659 (c), 661 (i); see 29 CFR §§ 2200.90, 2200.91 (1976).

If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed pen-

[3] Petitioners make no challenge to the absence of mandatory review by the Commission of the administrative law judge's findings of fact.

alty becomes final unless the employer timely petitions for judicial review in the appropriate court of appeals. 29 U. S. C. § 660 (a). The Secretary similarly may seek review of Commission orders, § 660 (b), but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." § 660 (a). If the employer fails to pay the assessed penalty, the Secretary may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried. § 666 (k). Thus, the penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation.

II

Petitioners were separately cited by the Secretary and ordered immediately to abate pertinent hazards after inspections of their respective worksites conducted in 1972 revealed conditions that assertedly violated a mandatory occupational safety standard promulgated by the Secretary under § 5 (a)(2) of the Act, 29 U. S. C. § 654 (a)(2). In each case an employee's death had resulted. Petitioner Irey was cited for a willful violation of 29 CFR § 1926.652 (b) and Table P–1 (1976)—a safety standard promulgated by the Secretary under the Act requiring the sides of trenches in "unstable or soft material" to be "shored, . . . sloped, or otherwise supported by means of sufficient strength to protect the employees working within them." The Secretary proposed a penalty of $7,500 for this violation and ordered the hazard abated immediately.

Petitioner Atlas was cited for a serious violation of 29 CFR §§ 1926.500 (b)(1) and (f)(5)(ii) (1976), which require that roof opening covers, be "so installed as to prevent accidental displacement." The Secretary proposed a penalty of $600 for this violation and ordered the hazard abated immediately.

Petitioners timely contested these citations and were afforded hearings before Administrative Law Judges of the

Commission. The judges, and later the Commission, affirmed the findings of violations and accompanying abatement requirements and assessed petitioner Irey a reduced civil penalty of $5,000 and petitioner Atlas the civil penalty of $600 which the Secretary had proposed. Petitioners respectively thereupon sought judicial review in the Courts of Appeals for the Third and Fifth Circuits, challenging both the Commission's factual findings that violations had occurred and the constitutionality of the Act's enforcement procedures.

A panel of the Court of Appeals for the Third Circuit affirmed the Commission's orders in the *Irey* case over petitioner's and a dissenter's contention that the failure to afford the employer a jury trial on the question whether he had violated OSHA was in violation of the Seventh Amendment to the United States Constitution which provides for jury trial in most civil suits at common law. 519 F. 2d 1200. On rehearing en banc, the Court of Appeals for the Third Circuit, over four dissents, adhered to the original panel's decision. *Id.*, at 1215. It concluded that this Court's rulings to date "leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage." *Id.*, at 1218.

The Court of Appeals for the Fifth Circuit also affirmed the Commission's order in the *Atlas* case over a similar claim that the enforcement scheme violated the Seventh Amendment. 518 F. 2d 990. It stated:

> "Where adjudicative responsibility rests only in the administering agency, 'jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme.' "[4] *Id.*, at 1011.

[4] The other Courts of Appeals which have passed on this issue have uniformly (and without a dissent) agreed with these results. *Mohawk*

We granted the petitions for writs of certiorari limited to the important question whether the Seventh Amendment prevents Congress from assigning to an administrative agency, under these circumstances, the task of adjudicating violations of OSHA.[5] 424 U. S. 964.

III

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." The phrase "Suits at common law" has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not. *Parsons* v. *Bedford*, 3 Pet. 433 (1830). Petitioners claim that a suit in a federal court by the Government for civil penalties for violation of a statute is a suit for a money judgment which is classically a suit at common law, *Whitehead* v. *Shattuck*, 138 U. S. 146, 151 (1891); and that the defendant therefore has a Seventh Amendment right to a jury determination of all issues of fact in such a case, see *Hepner* v. *United States*, 213 U. S. 103, 115 (1909) (dictum); *United States* v. *Regan*, 232 U. S. 37, 47 (1914) (dictum).[6]

Excavating, Inc. v. *Occupational Safety & Health Rev. Comm'n*, 549 F. 2d 859 (CA2 1977); *Beall Constr. Co.* v. *Occupational Safety & Health Rev. Comm'n*, 507 F. 2d 1041 (CA8 1974); *Brennan* v. *Winters Battery Mfg. Co.*, 531 F. 2d 317 (CA6 1975); *Clarkson Constr. Co.* v. *Occupational Safety & Health Rev. Comm'n*, 531 F. 2d 451 (CA10 1976). See also *Underhill Constr. Corp.* v. *Secretary of Labor*, 526 F. 2d 53, 57 n. 10 (CA2 1975).

[5] Each petitioner also argued below that the enforcement scheme violates the constitutional requirements that juries decide fact issues in criminal cases—arguing that the fines involved are "penal" in nature. Each petitioner asked this Court in its petition for a writ of certiorari to review the unfavorable rulings of the courts below on this issue.

[6] In light of our disposition of these cases we decline the respondents' invitation to decide whether the dictum in these cases correctly divines the intent of the Seventh Amendment or whether, as the respondents

Petitioners then claim that to permit Congress to assign the function of adjudicating the Government's rights to civil penalties for violation of the statute to a different forum—an administrative agency in which no jury is available—would be to permit Congress to deprive a defendant of his Seventh Amendment jury right. We disagree. At least in cases in which "public rights" are being litigated—*e. g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[7]

Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court, albeit often without express reference to the Seventh Amendment. Thus taxes may constitutionally be assessed and collected together with penalties, with the relevant facts in some instances being adjudicated only by an administrative agency. *Phillips* v. *Commissioner*, 283 U. S. 589, 599–600 (1931); *Murray's*

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argue, the Seventh Amendment has no application to Government litigation and leaves solely to the Sixth Amendment the function of interposing a jury between the Federal Government and an individual from whom it wishes to exact a fine. See *Muniz* v. *Hoffman*, 422 U. S. 454 (1975).

[7] These cases do not involve purely "private rights." In cases which do involve only "private rights," this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master. *Crowell* v. *Benson*, 285 U. S. 22, 51–65 (1932). The Court there said: "On the common law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." *Id.*, at 51.

Lessee v. *Hoboken Land Co.*, 18 How. 272, 284 (1856).[8] Neither of these cases expressly discussed the question whether the taxation scheme violated the Seventh Amendment. However, in *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), the Court said, in rejecting a claim under the Sixth Amendment that the assessment and adjudication of tax penalties could not be made without a jury, that "the determination of the facts upon which liability is based may be by an administrative agency instead of a jury," *id.*, at 402. Similarly, Congress has entrusted to an administrative agency the task of adjudicating violations of the customs and immigration laws and assessing penalties based thereon. *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335 (1932) ("[D]ue process of law does not require that the courts, rather than administrative officers, be charged . . . with determining the facts upon which the imposition of [fines] depends"); *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320 (1909).[9] See also *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, 458 (1929).

In *Block* v. *Hirsh*, 256 U. S. 135 (1921), the Court sustained Congress' power to pass a statute, applicable to the District of Columbia, temporarily suspending landlords' legal remedy of ejectment and relegating them to an administrative fact-

[8] In *Murray's Lessee*, the Court stated:

"[T]here are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but *which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.*" 18 How., at 284. (Emphasis added.)

[9] In *Oceanic*, the Court stated:

"In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, *and other subjects*, has proceeded on the conception that *it was within the competency of Congress, when legislating as to matters exclusively within its control*, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, *giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.*" 214 U. S., at 339. (Emphasis added.)

finding forum charged with determining fair rents at which tenants could hold over despite the expiration of their leases. In that case the Court squarely rejected a challenge to the statute based on the Seventh Amendment, stating:

> "The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. *If the power of the Commission established by the statute to regulate the relation is established,* as we think it is, by what we have said, *this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.*" *Id.*, at 158. (Emphasis added.)

In *Crowell* v. *Benson*, 285 U. S. 22 (1932), apparently referring to the above-cited line of authority, the Court stated:

> "[T]he distinction is at once apparent between cases of private right and those which arise *between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.* . . . [T]he Congress, in exercising the powers confided to it may establish 'legislative' courts . . . to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.' But '*the mode of determining matters of this class is completely within congressional control.* Congress may reserve to itself the power to decide, *may delegate that power to executive officers,* or may commit it to judicial tribunals.' . . . Familiar illustrations of *administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate* and foreign *commerce,* taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.*, at 50–51. (Emphasis added.)

In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the Court squarely addressed the Seventh Amendment issue involved when Congress commits the factfinding function under a new statute to an administrative tribunal. Under the National Labor Relations Act, Congress had committed to the National Labor Relations Board, in a proceeding brought by its litigating arm, the task of deciding whether an unfair labor practice had been committed and of ordering backpay where appropriate. The Court stated:

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. *It is a statutory proceeding.* Reinstatement of the employee and payment for time lost *are requirements* [*administratively*] *imposed for violation of the statute and are remedies appropriate to its enforcement.* The contention under the Seventh Amendment is without merit." *Id.*, at 48–49. (Emphasis added.) [10]

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[10] The Court also rejected the Seventh Amendment claim in *Jones & Laughlin* on the separate ground that that Amendment is inapplicable where "recovery of money damages is an incident to [nonlegal] relief even though damages might have been recovered in an action at law," 301 U. S., at 48–49, since in such cases courts of equity would historically have granted monetary relief. In *Jones & Laughlin*, the NLRB ordered reinstatement of a dismissed employee, an order analogous to injunctive relief historically obtainable only in a court of equity, and consequently this alternative ground was an adequate one to decide *Jones & Laughlin*. However, this alternative ground would have been insufficient to decide the more general question of the NLRB's power to order backpay where, for one reason or another, no such equitable order was sought. See *Radio Officers* v. *NLRB*, 347 U. S. 17, 54 (1954); *NLRB* v. *National Garment Co.*, 166 F. 2d 233 (CA8 1948); *NLRB* v. *Brookside Industries, Inc.*, 308 F. 2d 224 (CA4 1962); *Bon Hennings Logging Co.* v. *NLRB*, 308 F. 2d 548 (CA9 1962); *NLRB* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902 (CA9 1953); *Reliance Mfg. Co.* v. *NLRB*, 125 F. 2d 311 (CA7 1941); *NLRB* v. *Carpenters*, 238 F. 2d 832 (CA5 1956); *Indianapolis Power & Light Co.* v. *NLRB*, 122 F. 2d 757 (CA7 1941).

This passage from *Jones & Laughlin* has recently been explained in *Curtis* v. *Loether*, 415 U. S. 189 (1974), in which the Court held the Seventh Amendment applicable to private damages suits in federal courts brought under the housing discrimination provisions of the Civil Rights Act of 1968. The Court rejected the argument that *Jones & Laughlin* held the Seventh Amendment inapplicable to any action based on a statutorily created right even if the action was brought before a tribunal which customarily utilizes a jury as its fact-finding arm. Instead, we concluded that *Jones & Laughlin* upheld

> "congressional power to entrust enforcement of statutory rights to *an administrative process or specialized court of equity* [11] free from the strictures of the Seventh Amendment." 415 U. S., at 194–195. (Emphasis added.)

Finally, in *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974),[12] in discussing *Block* v. *Hirsh*, 256 U. S. 135 (1921), and *Jones & Laughlin*, we stated:

> "*Block* v. *Hirsh* merely stands for the principle that *the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication*. . . . We may assume that the Seventh Amendment would not be a bar to a congressional effort to

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[11] The Court had reference to *Katchen* v. *Landy*, 382 U. S. 323 (1966), in which this Court sustained the power of a bankruptcy court, exercising summary jurisdiction without a jury, to adjudicate the otherwise legal issues of voidable preferences. The Court did so on the ground that a bankruptcy court, exercising its summary jurisdiction, was a specialized court of equity and constituted a forum before which a jury would be out of place and would go far to dismantle the statutory scheme.

[12] The holding in *Pernell* was that the Seventh Amendment applies to resolution of disputes of a "legal" nature—those regarding right to possession of real property when the resolution is entrusted to a forum which customarily employs a jury.

> entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. Congress has not seen fit to do so, however, but rather has provided that actions under § 16–1501 be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction. Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial." 416 U. S., at 383. (Emphasis added.)

In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law."[13] Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency. Petitioners would nevertheless have us disregard the interpretation of *Jones & Laughlin* which we recently espoused in *Curtis* v. *Loether* and *Pernell* v. *Southall Realty*, reading it instead as a holding solely that the entire proceeding before the NLRB was really equitable in nature; and they would have us entirely disregard *Block* v.

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[13] We note that the decision of the administrative tribunal in these cases on the law is subject to review in the federal courts of appeals, and on the facts is subject to review by such courts of appeals under a substantial-evidence test. Thus, these cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings.

Hirsh, supra. They would have us disregard the dictum in *Crowell* v. *Benson*, 285 U. S. 22 (1932), that the adjudication of congressionally created public rights may be assigned to administrative agencies, as well as the similar holdings in *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329 (1932); *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320 (1909); *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272 (1856); *Phillips* v. *Commissioner*, 283 U. S. 589 (1931); and *Helvering* v. *Mitchell*, 303 U. S. 391 (1938).

None of the grounds tendered for so reinterpreting the Seventh Amendment is convincing. It is suggested that in some of the cases, *Elting, Oceanic, Murray's Lessee, Phillips,* and *Helvering,* the Seventh Amendment was not expressly put in issue. But these cases are clear enough that in the context involved, there was no requirement that the courts be involved at all in the factfinding process in the first instance. It is difficult to believe that these holdings or dicta did not subsume the proposition that a jury trial was not required. Furthermore, there are the remaining cases where the Court expressly held or observed that the Seventh Amendment did not bar administrative factfindings. *Jones & Laughlin, Block, Pernell,* and *Curtis.*

Second, it is argued with some force that cases such as *Murray's Lessee, Elting, Oceanic, Phillips,* and *Helvering* all deal with the exercise of sovereign powers that are inherently in the exclusive domain of the Federal Government and critical to its very existence—the power over immigration, the importation of goods, and taxation—and that the theory of those cases is inapplicable where the Government exercises other powers that petitioners apparently regard as less fundamental, less exclusive, and less vital to the existence of the Nation, such as the power to regulate commerce among the several States, the latter being the power Congress sought to exercise in enacting the statute at issue here. The difficulty with this argument is that the Court in these cases, and in

others, did not appear to confine its holdings in this manner. In *Murray's Lessee* the Court referred to "matters, involving public rights [that] congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." 18 How., at 284. In *Oceanic*, which sustained the administrative imposition of a fine for the wrongful importation of aliens, the Court said that its ruling was in accordance with "settled judicial construction" that "not only as to tariff but as to internal revenue, taxation and *other subjects*" Congress could "impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." 214 U. S., at 339. (Emphasis added.) *Crowell* spoke broadly of the distinction between cases of private right and those which arise between the Government and persons subject to its authority "in connection with the performance of the constitutional functions of the executive or legislative departments," see *supra*, at 452, and gave "familiar illustrations" of the permissible use of administrative agencies in connection with the exercise of such congressional powers as "interstate and foreign commerce." 285 U. S., at 51. *Helvering* v. *Mitchell*, *supra*, at 402–403, relying on *Oceanic* and similar cases, stated simply that "the determination of the facts upon which liability is based may be by an administrative agency instead of a jury." It is also apparent that *Jones & Laughlin*, *Pernell*, and *Curtis* are not amenable to the limitations suggested by petitioners.

Third is the assertion that the right to jury trial was never intended to depend on the identity of the forum to which Congress has chosen to submit a dispute; otherwise, it is said, Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts.

The argument is well put, but it overstates the holdings of our prior cases and is in any event unpersuasive. Our prior cases support administrative factfinding in only those situations involving "public rights," *e. g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.

More to the point, it is apparent from the history of jury trial in civil matters that factfinding, which is the essential function of the jury in civil cases, *Colgrove* v. *Battin*, 413 U. S. 149, 157 (1973), was never the exclusive province of the jury under either the English or American legal systems at the time of the adoption of the Seventh Amendment; and the question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which a litigant found himself. Critical factfinding was performed without juries in suits in equity, and there were no juries in admiralty, *Parsons* v. *Bedford*, 3 Pet. 433 (1830); nor were there juries in the military justice system. The jury was the factfinding mode in most suits in the common-law courts, but it was not exclusively so: Condemnation was a suit at common law but constitutionally could be tried without a jury, *Kohl* v. *United States*, 91 U. S. 367, 375–376 (1876); *Bauman* v. *Ross*, 167 U. S. 548, 593 (1897); *United States* v. *Reynolds*, 397 U. S. 14, 18 (1970). "[M]any civil as well as criminal proceedings at common law were without a jury." *Kohl* v. *United States*, *supra*, at 376. The question whether a particular case was to be tried in a court of equity—without a jury—or a court of law—with a jury—did not depend on whether the suit involved factfinding or on the nature of the facts to be found. Factfinding could be a critical matter either at law or in equity. Rather, as a general rule, the decision turned on whether courts of law supplied a cause of action and an

adequate remedy to the litigant.[14] If it did, then the case would be tried in a court of law before a jury. Otherwise the case would be tried to a court of equity sitting without a jury. Thus, suits for damages for breach of contract, for example, were suits at common law with the issues of the making of the contract and its breach to be decided by a jury; but specific performance was a remedy unavailable in a court of law and where such relief was sought the case would be tried in a court of equity with the facts as to making and breach to be ascertained by the court.

The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be "preserved." It thus did not purport to require a jury trial where none was required before. Moreover, it did not seek to change the factfinding mode in equity or admiralty or to freeze equity jurisdiction as it existed in 1789, preventing it from developing new remedies where those available in courts of law were inadequate. *Ross* v. *Bernhard*, 396 U. S. 531 (1970), is instructive in this respect. We there held that a jury trial is required in stockholder derivative suits where, if the corporation itself had sued, a jury trial would have been available to the corporation. It is apparent, however, that prior to the 1938 Federal Rules of Civil Procedure merging the law and equity functions of the federal courts, the very suit involved in *Bernhard* would have been in a court of equity sitting without a jury, not because the underlying issue was any different at all from the issue the corporation would have presented had it sued, but because the stockholder plaintiff who was denied standing in a court of law to sue on the issue was enabled in proper circumstances, starting in the early part

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[14] The Judiciary Act of 1789, 1 Stat. 82, which was in this respect declaratory of existing law, provided:

"SEC. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

of the 19th century, to sue in equity on behalf of the company.

The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. We cannot conclude that the Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries. Indeed, as the *Oceanic* opinion said, the "settled judicial construction" was to the contrary "from the beginning." 214 U. S., at 339. That case indicated, as had *Hepner* v. *United States*, 213 U. S. 103 (1909), that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary, in which event jury trial would be required, see also *United States* v. *Regan*, 232 U. S. 37 (1914), but that the United States could also validly opt for administrative enforcement, without judicial trials. See also *Helvering* v. *Mitchell*, 303 U. S., at 402–403, and *Crowell* v. *Benson*, 285 U. S., at 50–51.[15]

Thus, history and our cases support the proposition that the

[15] Finally, it should be noted that, if the fines involved in these cases were made criminal fines instead of civil fines, the Seventh Amendment would be inapplicable by its terms. The Sixth Amendment would then govern the employer's right to a jury and under our prior cases no jury trial would be required. *Muniz* v. *Hoffman*, 422 U. S. 454 (1975). It would be odd to hold that Congress could avoid the jury-trial requirement by labeling the civil penalties criminal fines but not by assigning their adjudication to an administrative agency.

right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved.[16] Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law.

The judgments below are affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the decision of these cases.

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[16] Petitioners claim that permitting Congress to control the jury-right question by picking the forum is to delegate to it, rather than this Court, the final power to decide Seventh Amendment issues. The claim is incorrect. The Seventh Amendment prevents Congress from depriving a litigant of a jury trial in a "legal" action before a tribunal customarily utilizing a jury as its factfinding arm, *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974), and this Court has the final decision on the question whether a jury is required.

SANTA FE INDUSTRIES, INC., ET AL. *v.* GREEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75–1753. Argued January 18–19, 1977—Decided March 23, 1977

Delaware's "short-form merger" statute enables a parent company owning at least 90% of the stock of a subsidiary to merge with the subsidiary upon approval of the parent company's board of directors, and to make cash payments for the minority shareholders' shares. Though advance notice to or consent of the minority shareholders is not required, they must be notified within 10 days of the merger's effective date, and any dissatisfied minority shareholder may petition the Delaware Court of Chancery for the payment of the fair value of his shares as determined by a court-appointed appraiser subject to court review. Pursuant to that statutory procedure petitioner Santa Fe Industries, which had acquired 95% control of another company (Kirby), after obtaining independent appraisals of Kirby's assets and submitting them with financial data to a banking firm to appraise the Kirby stock's fair market value, decided to offer the minority stockholders $150 per share, which was more than the banking firm's appraisal. The minority stockholders were notified the day after the merger became effective and advised of their right to obtain an appraisal if dissatisfied with the $150 price, and were given an information statement containing relevant financial data about Kirby, the appraisals of its assets, and the banking firm's stock appraisal. Respondents, minority stockholders who objected to the merger, instead of pursuing their Delaware appraisal remedy, brought this action in District Court seeking to set aside the merger and to recover the fair value for their stock, which they claimed was at least $772 per share. Respondents alleged that the Kirby stock had been fraudulently appraised in an effort to freeze out the minority stockholders at an inadequate price, in violation of § 10 (b) of the Securities Exchange Act of 1934, which makes it "unlawful for any person . . . [t]o use or employ . . . any manipulative or deceptive device or contrivance in contravention of [Securities and Exchange Commission rules]," and Rule 10b–5 issued thereunder, which, in addition to nondisclosure and misrepresentation, prohibits any "artifice to defraud" or any act "which operates or would operate as a fraud or deceit." The District Court dismissed the complaint for failure, with

respect to the two aspects on which respondents' case was deemed to rest, to state a claim upon which relief could be granted: (1) With regard to the claim that actionable fraud inhered in the allegedly gross undervaluation of the minority shares, the court concluded that if "full and fair disclosure is made, transactions eliminating minority interests are beyond the purview of Rule 10b–5," and that respondents did not allege any nondisclosure or misrepresentation in this case. (2) With regard to the claim that the merger was undertaken without prior notice to minority shareholders, and was solely to eliminate the minority from the company and therefore lacked any justifiable business purpose, the court concluded that Rule 10b–5 did not override the Delaware corporation law provisions, which do not require a business purpose or prior notice for a short-form merger. The Court of Appeals reversed. While not disagreeing with the lower court's conclusions with respect to (1), *supra*, the Court of Appeals concluded that Rule 10b–5 reached "breaches of fiduciary duty by a majority against minority shareholders without any charge of misrepresentation or lack of disclosure," and that therefore the complaint, taken as a whole, stated a cause of action under the Rule. *Held:*

1. Only conduct involving manipulation or deception is reached by § 10 (b) or Rule 10b–5. "When a statute speaks so specifically in terms of manipulation and deception, . . . and when its history reflects no more expansive intent, [the Court is] quite unwilling to extend the scope of the statute . . . ," *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214. Pp. 471–474.

2. The Kirby merger, if carried out as alleged in respondents' complaint, was neither deceptive nor manipulative and therefore did not violate § 10 (b) or Rule 10b–5. The minority shareholders were furnished with all relevant information with which to decide whether to accept the price offered for their stock or reject it and seek an appraisal in the Delaware court, and the cases relied on by respondents and the Court of Appeals in which breaches of fiduciary duty were held violative of Rule 10b–5, all of which included some element of deception, are inappropriate here where there was none. Manipulation is "virtually a term of art when used in connection with securities markets," *Ernst & Ernst*, *supra*, at 199, referring to practices that are intended to mislead investors by artificially affecting market activities, none of which was involved here. Pp. 474–477.

3. A holding that the complaint in this case alleged fraud under Rule 10b–5 would bring within the Rule a wide variety of corporate conduct traditionally left to state regulation. Absent a clear indication

of congressional intent, the Court should be reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. Cf. *Cort* v. *Ash*, 422 U. S. 78, 84; *Piper* v. *Chris-Craft Industries, Inc.*, *ante*, at 41. Pp. 477–480.

533 F. 2d 1283, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined, and in all but Part IV of which BLACKMUN and STEVENS, JJ., joined. BLACKMUN, J., *post*, p. 480, and STEVENS, J., *post*, p. 480, filed opinions concurring in part. BRENNAN, J., filed a dissenting statement, *post*, p. 480.

William R. Glendon argued the cause for petitioners. With him on the briefs were *Robert D. Larsen* and *Guy C. Quinlan.*

Sidney Bender argued the cause for respondents. With him on the brief was *Aaron Lewittes.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case involves the reach and coverage of § 10 (b) of the Securities Exchange Act of 1934 and Rule 10b–5 [1] thereunder in the context of a Delaware short-form

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[1] Section 10 of the Securities Exchange Act of 1934, 15 U. S. C. § 78j, provides in relevant part:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b–5, 17 CFR § 240.10b–5 (1976), provides:

"Employment of manipulative and deceptive devices.

"It shall be unlawful for any person, directly or indirectly, by the use of

merger transaction used by the majority stockholder of a corporation to eliminate the minority interest.

I

In 1936, petitioner Santa Fe Industries, Inc. (Santa Fe), acquired control of 60% of the stock of Kirby Lumber Corp. (Kirby), a Delaware corporation. Through a series of purchases over the succeeding years, Santa Fe increased its control of Kirby's stock to 95%; the purchase prices during the period 1968–1973 ranged from $65 to $92.50 per share.[2] In 1974, wishing to acquire 100% ownership of Kirby, Santa Fe availed itself of § 253 of the Delaware Corporation Law, known as the "short-form merger" statute. Section 253 permits a parent corporation owning at least 90% of the stock of a subsidiary to merge with that subsidiary, upon approval by the parent's board of directors, and to make payment in cash for the shares of the minority stockholders. The statute does not require the consent of, or advance notice to, the minority stockholders. However, notice of the merger must be given within 10 days after its effective date, and any stockholder who is dissatisfied with the terms of the merger may petition the Delaware Court of Chancery for a decree ordering the surviving corporation to pay him the fair value

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any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security."

[2] App. 33a (merger information statement, considered by parties and court below as part of the amended complaint). Sante Fe controlled Kirby through its wholly owned subsidiary, Santa Fe Natural Resources, Inc., which owned the Kirby stock.

of his shares, as determined by a court-appointed appraiser subject to review by the court. Del. Code Ann., Tit. 8, §§ 253, 262 (1975 ed. and Supp. 1976).

Santa Fe obtained independent appraisals of the physical assets of Kirby—land, timber, buildings, and machinery—and of Kirby's oil, gas, and mineral interests. These appraisals, together with other financial information, were submitted to Morgan Stanley & Co. (Morgan Stanley), an investment banking firm retained to appraise the fair market value of Kirby stock. Kirby's physical assets were appraised at $320 million (amounting to $640 for each of the 500,000 shares); Kirby's stock was valued by Morgan Stanley at $125 per share. Under the terms of the merger, minority stockholders were offered $150 per share.

The provisions of the short-form merger statute were fully complied with.[3] The minority stockholders of Kirby were notified the day after the merger became effective and were advised of their right to obtain an appraisal in Delaware court if dissatisfied with the offer of $150 per share. They also received an information statement containing, in addition to the relevant financial data about Kirby, the appraisals of the value of Kirby's assets and the Morgan Stanley appraisal concluding that the fair market value of the stock was $125 per share.

Respondents, minority stockholders of Kirby, objected to the terms of the merger, but did not pursue their appraisal

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[3] The merger became effective on July 31, 1974, and was accomplished in the following way. A new corporation, Forest Products, Inc., was organized as a Delaware corporation. The Kirby stock, together with cash, was transferred from Santa Fe's wholly owned subsidiary (see n. 2, *supra*) to Forest Products in exchange for all of the Forest Products stock. The new corporation was then merged into Kirby, with Kirby as the surviving corporation. The cash transferred to Forest Products was used to make the purchase offer for the Kirby shares not owned by the Santa Fe subsidiary.

remedy in the Delaware Court of Chancery.[4] Instead, they brought this action in federal court on behalf of the corporation and other minority stockholders, seeking to set aside the merger or to recover what they claimed to be the fair value of their shares. The amended complaint asserted that, based on the fair market value of Kirby's physical assets as revealed by the appraisal included in the information statement sent to minority shareholders, Kirby's stock was worth at least $772 per share.[5] The complaint alleged further that the merger took place without prior notice to minority stockholders; that the purpose of the merger was to appropriate the difference between the "conceded pro rata value of the physical assets," App. 103a, and the offer of $150 per share—to "freez[e] out the minority stockholders at a wholly inadequate price," *id.*, at 100a; and that Santa Fe, knowing the appraised value of the physical assets, obtained a "fraudulent appraisal" of the stock from Morgan Stanley and offered $25 above that appraisal "in order to lull the minority stockholders into erroneously believing that [Santa Fe was] generous." *Id.*, at 103a. This course of conduct was alleged to be "a violation of Rule 10b–5 because defendants employed a 'device, scheme, or artifice to defraud' and engaged in an 'act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale

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[4] On August 21, 1974, respondents petitioned for an appraisal of their Kirby stock, but they withdrew that petition on September 9 and the next day commenced this lawsuit.

[5] The figure of $772 per share was calculated as follows:

"The difference of $311,000,000 ($622 per share) between the fair market value of Kirby's land and timber, alone, as per the defendants' own appraisal thereof at $320,000,000 and the $9,000,000 book value of said land and timber, added to the $150 per share, yields a pro rata share of the value of the physical assets of Kirby of at least $772 per share. The value of the stock was at least the pro rata value of the physical assets." App. 102a.

of any security.'" *Ibid.*[6] Morgan Stanley assertedly participated in the fraud as an accessory by submitting its appraisal of $125 per share although knowing the appraised value of the physical assets.

The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. 391 F. Supp. 849 (SDNY 1975). As the District Court understood the complaint, respondents' case rested on two distinct grounds. First, federal law was assertedly violated because the merger was for the sole purpose of eliminating the minority from the company, therefore lacking any justifiable business purpose, and because the merger was undertaken without prior notice to the minority shareholders. Second, the low valuation placed on the shares in the cash-exchange offer was itself said to be a fraud actionable under Rule 10b–5. In rejecting the first ground for recovery, the District Court reasoned that Delaware law required neither a business purpose for a short-form merger nor prior notice to the minority shareholders who the statute contemplated would be removed from the company, and that Rule 10b–5 did not override these provisions of state corporate law by independently placing a duty on the majority not to merge without prior notice and without a justifiable business purpose.

As for the claim that actionable fraud inhered in the allegedly gross undervaluation of the minority shares, the District Court observed that respondents valued their shares at a minimum of $772 per share, "basing this figure on the *pro rata* value of Kirby's physical assets." *Id.*, at 853. Accepting this

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[6] The complaint also alleged a breach of fiduciary duty under state law and asserted that the federal court had both diversity and pendent jurisdiction over this claim. The District Court found an absence of complete diversity of citizenship between the plaintiffs and defendants because of the defendant Morgan Stanley and refused to exercise pendent jurisdiction because it held that the complaint failed to state a claim under the federal securities laws. 391 F. Supp. 849, 855 (SDNY 1975).

valuation for purposes of the motion to dismiss, the District Court further noted that, as revealed by the complaint, the physical asset appraisal, along with other information relevant to Morgan Stanley's valuation of the shares, had been included with the information statement sent to respondents within the time required by state law. It thought that if "full and fair disclosure is made, transactions eliminating minority interests are beyond the purview of Rule 10b–5," and concluded that the "complaint fail[ed] to allege an omission, misstatement or fraudulent course of conduct that would have impeded a shareholder's judgment of the value of the offer." *Id.*, at 854. The complaint therefore failed to state a claim and was dismissed.[7]

A divided Court of Appeals for the Second Circuit reversed. 533 F. 2d 1283 (1976). It first agreed that there was a double aspect to the case: first, the claim that gross undervaluation of the minority stock itself violated Rule 10b–5; and second, that "without any misrepresentation or failure to disclose relevant facts, the merger itself constitutes a violation of Rule 10b–5" because it was accomplished without any corporate purpose and without prior notice to the minority stockholders. *Id.*, at 1285. As to the first aspect of the case, the Court of Appeals did not disturb the District Court's conclusion that the complaint did not allege a material misrepresentation or nondisclosure with respect to the value of the stock; and the court declined to rule that a claim of gross

[7] The District Court also based its holding on the alternative ground that the injuries alleged in the complaint were not causally related to any deception by the majority shareholder:

"Assuming *arguendo* that the merger information statement did not constitute adequate disclosure, the amended complaint does not demonstrate a causal connection between the alleged deception and plaintiffs' damages. Plaintiffs did not tender their shares for cancellation and payment pursuant to this merger plan. . . . From the outset, plaintiffs recognized the alleged deception and did not rely upon it." 391 F. Supp., at 855.

undervaluation itself would suffice to make out a Rule 10b–5 case. With respect to the second aspect of the case, however, the court fundamentally disagreed with the District Court as to the reach and coverage of Rule 10b–5. The Court of Appeals' view was that, although the Rule plainly reached material misrepresentations and nondisclosures in connection with the purchase or sale of securities, neither misrepresentation nor nondisclosure was a necessary element of a Rule 10b–5 action; the Rule reached "breaches of fiduciary duty by a majority against minority shareholders without any charge of misrepresentation or lack of disclosure." *Id.*, at 1287.[8] The court went on to hold that the complaint, taken as a whole, stated a cause of action under the Rule:

> "We hold that a complaint alleges a claim under Rule 10b–5 when it charges, in connection with a Delaware short-form merger, that the majority has committed a breach of its fiduciary duty to deal fairly with minority shareholders by effecting the merger without any justifiable business purpose. The minority shareholders are given no prior notice of the merger, thus having no opportunity to apply for injunctive relief, and the proposed price to be paid is substantially lower than the appraised value reflected in the Information Statement." *Id.*, at 1291.

See also *id.*, at 1289.[9]

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[8] The court concluded its discussion thus:
"Whether full disclosure has been made is not the crucial inquiry since it is the merger and the undervaluation which constituted the fraud, and not whether or not the majority determines to lay bare their real motives. If there is no valid corporate purpose for the merger, then even the most brazen disclosure of that fact to the minority shareholders in no way mitigates the fraudulent conduct." 533 F. 2d, at 1292.

[9] The Court of Appeals affirmed, however, the dismissal of the complaint against Morgan Stanley. As the Court of Appeals understood it, Morgan Stanley had not been charged with participating in the majority shareholder's breach of fiduciary duty; it had been involved only in evaluation

We granted the petition for certiorari challenging this holding because of the importance of the issue involved to the administration of the federal securities laws. 429 U. S. 814 (1976). We reverse.

II

Section 10 (b) of the 1934 Act makes it "unlawful for any person . . . to use or employ . . . any manipulative or deceptive device or contrivance in contravention of [Securities and Exchange Commission rules]"; Rule 10b–5, promulgated by the SEC under § 10 (b), prohibits, in addition to nondisclosure and misrepresentation, any "artifice to defraud" or any act "which operates or would operate as a fraud or deceit." [10] The court below construed the term "fraud" in Rule 10b–5 by adverting to the use of the term in several of this Court's decisions in contexts other than the 1934 Act and the related Securities Act of 1933, 15 U. S. C. § 77a *et seq.*[11] The Court

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of the stock and the compilation of its report with respect thereto. The complaint contained "no allegation that Morgan Stanley & Co. engaged in any misrepresentation or nondisclosure such as would support its liability under Rule 10b–5 (2)." *Ibid.*

[10] See n. 1, *supra.*

[11] The Court of Appeals quoted passages from *Pepper* v. *Litton*, 308 U. S. 295, 306, 311 (1939) (where this Court upheld the disallowance of a bankruptcy claim of a controlling stockholder who violated his fiduciary obligation to the other stockholders), and from 1 J. Story, Equity Jurisprudence § 187 (1853); the court also cited cases that quoted the passage from Mr. Justice Story's treatise—*Moore* v. *Crawford*, 130 U. S. 122, 128 (1889) (a diversity suit to compel execution of a deed held in constructive trust), and *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 194 (1963) (Investment Advisers Act of 1940 prohibits, as a "fraud or deceit upon any client," a registered investment adviser's failure to disclose to his clients his own financial interest in his recommendations). Although *Capital Gains* involved a federal securities statute, the Court's references to fraud in the "equitable" sense of the term were premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers. See *id.*, at 191–192, 194. Moreover, the fraud that the SEC sought to enjoin in *Capital Gains* was, in fact, a nondisclosure.

of Appeals' approach to the interpretation of Rule 10b–5 is inconsistent with that taken by the Court last Term in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976).

Ernst & Ernst makes clear that in deciding whether a complaint states a cause of action for "fraud" under Rule 10b–5, "we turn first to the language of § 10 (b), for '[t]he starting point in every case involving construction of a statute is the language itself.'" *Id.*, at 197, quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). In holding that a cause of action under Rule 10b–5 does not lie for mere negligence, the Court began with the principle that "[a]scertainment of congressional intent with respect to the standard of liability created by a particular section of the [1933 and 1934] Acts must . . . rest primarily on the language of that section," 425 U. S., at 200, and then focused on the statutory language of § 10 (b)—"[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance.'" *Id.*, at 197. The same language and the same principle apply to this case.

To the extent that the Court of Appeals would rely on the use of the term "fraud" in Rule 10b–5 to bring within the ambit of the Rule all breaches of fiduciary duty in connection with a securities transaction, its interpretation would, like the interpretation rejected by the Court in *Ernst & Ernst*, "add a gloss to the operative language of the statute quite different from its commonly accepted meaning." *Id.*, at 199. But, as the Court there held, the language of the statute must control the interpretation of the Rule:

> "Rule 10b–5 was adopted pursuant to authority granted the [Securities and Exchange] Commission under § 10 (b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is '"the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."'. . . [The

> scope of the Rule] cannot exceed the power granted the Commission by Congress under § 10 (b)." *Id.*, at 212–214.[12]

The language of § 10 (b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception. Nor have we been cited to any evidence in the legislative history that would support a departure from the language of the statute.[13] "When a statute speaks so specifically in terms of manipulation and deception, . . . and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute . . . ." *Id.*, at 214. Thus the claim of fraud and fiduciary breach in this complaint states a cause of action under any part of Rule 10b–5 only if

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[12] The case for adhering to the language of the statute is even stronger here than in *Ernst & Ernst*, where the interpretation of Rule 10b–5 rejected by the Court was strongly urged by the Commission. See also *Piper* v. *Chris-Craft Industries, Inc.*, *ante*, p. 1, and *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975) (rejecting interpretations of Rule 10b–5 urged by the SEC as *amicus curiae*). By contrast, the Commission apparently has not concluded that Rule 10b–5 should be used to reach "going private" transactions where the majority stockholder eliminates the minority at an allegedly unfair price. See SEC Securities Act Release No. 5567 (Feb. 6, 1975), CCH Fed. Sec. L. Rep. ¶ 80,104 (proposing Rules 13e–3A and 13e–3B dealing with "going private" transactions, pursuant to six sections of the 1934 Act including § 10 (b), but stating that the Commission "has reached no conclusions with respect to the proposed rules"). Because we are concerned here only with § 10 (b), we intimate no view as to the Commission's authority to promulgate such rules under other sections of the Act.

[13] As the Court noted in *Ernst & Ernst:* "Neither the intended scope of § 10 (b) nor the reasons for the changes in its operative language are revealed explicitly in the legislative history of the 1934 Act, which deals primarily with other aspects of the legislation." 425 U. S., at 202. The only specific reference to § 10 in the Senate Report on the 1934 Act merely states that the section was "aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function." S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934).

the conduct alleged can be fairly viewed as "manipulative or deceptive" within the meaning of the statute.

III

It is our judgment that the transaction, if carried out as alleged in the complaint, was neither deceptive nor manipulative and therefore did not violate either § 10 (b) of the Act or Rule 10b–5.

As we have indicated, the case comes to us on the premise that the complaint failed to allege a material misrepresentation or material failure to disclose. The finding of the District Court, undisturbed by the Court of Appeals, was that there was no "omission" or "misstatement" in the information statement accompanying the notice of merger. On the basis of the information provided, minority shareholders could either accept the price offered or reject it and seek an appraisal in the Delaware Court of Chancery. Their choice was fairly presented, and they were furnished with all relevant information on which to base their decision.[14]

We therefore find inapposite the cases relied upon by respondents and the court below, in which the breaches of

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[14] In addition to their principal argument that the complaint alleges a fraud under clauses (a) and (c) of Rule 10b–5, respondents also argue that the complaint alleges nondisclosure and misrepresentation in violation of clause (b) of the Rule. Their major contention in this respect is that the majority stockholder's failure to give the minority advance notice of the merger was a material nondisclosure, even though the Delaware short-form merger statute does not require such notice. Brief for Respondents 27. But respondents do not indicate how they might have acted differently had they had prior notice of the merger. Indeed, they accept the conclusion of both courts below that under Delaware law they could not have enjoined the merger because an appraisal proceeding is their sole remedy in the Delaware courts for any alleged unfairness in the terms of the merger. Thus, the failure to give advance notice was not a material nondisclosure within the meaning of the statute or the Rule. Cf. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438 (1976).

fiduciary duty held violative of Rule 10b–5 included some element of deception.[15] Those cases forcefully reflect the principle that "[§] 10 (b) must be read flexibly, not technically

[15] The decisions of this Court relied upon by respondents all involved deceptive conduct as part of the Rule 10b–5 violation alleged. *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) (misstatements of material fact used by bank employees in position of market maker to acquire stock at less than fair value); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 9 (1971) ("seller [of bonds] was duped into believing that it, the seller, would receive the proceeds"). Cf. *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963) (injunction under Investment Advisers Act of 1940 to compel registered investment adviser to disclose to his clients his own financial interest in his recommendations).

We have been cited to a large number of cases in the Courts of Appeals, all of which involved an element of deception as part of the fiduciary misconduct held to violate Rule 10b–5. *E. g.*, *Schoenbaum* v. *Firstbrook*, 405 F. 2d 215, 220 (CA2 1968) (en banc), cert. denied, 395 U. S. 906 (1969) (majority stockholder and board of directors "were guilty of deceiving" the minority stockholders); *Drachman* v. *Harvey*, 453 F. 2d 722, 733, 736, 737 (CA2 1972) (en banc) (Rule 10b–5 violation alleged on facts found "indistinguishable" from *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*); *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F. 2d 374 (CA2 1974), cert. denied, 421 U. S. 976 (1975) (scheme of market manipulation and merger on unfair terms, one aspect of which was misrepresentation); *Pappas* v. *Moss*, 393 F. 2d 865, 869 (CA3 1968) ("if a 'deception' is required in the present context [of § 10 (b) and Rule 10b–5], it is fairly found by viewing this fraud as though the 'independent' stockholders were standing in the place of the defrauded corporate entity," where the board of directors passed a resolution containing at least two material misrepresentations and authorizing the sale of corporate stock to the directors at a price below fair market value); *Shell* v. *Hensley*, 430 F. 2d 819, 825 (CA5 1970) (derivative suit alleging that corporate officers used misleading proxy materials and other reports to deceive shareholders regarding a bogus employment contract intended to conceal improper payments to the corporation president and regarding purchases by the corporation of certain securities at excessive prices); *Rekant* v. *Desser*, 425 F. 2d 872, 882 (CA5 1970) (as part of scheme to cause corporation to issue Treasury shares and a promissory note for grossly inadequate consideration, corporate officers deceived shareholders by making affirma-

and restrictively" and that the statute provides a cause of action for any plaintiff who "suffer[s] an injury as a result of deceptive practices touching its sale [or purchase] of securities . . . ." *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12–13 (1971). But the cases do not support the proposition, adopted by the Court of Appeals below and urged by respondents here, that a breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure, violates the statute and the Rule.

It is also readily apparent that the conduct alleged in the complaint was not "manipulative" within the meaning of the statute. "Manipulation" is "virtually a term of art when used in connection with securities markets." *Ernst & Ernst*, 425 U. S., at 199. The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity. See, *e. g.*, § 9 of the 1934 Act, 15 U. S. C. § 78i (prohibiting specific manipulative practices); *Ernst & Ernst*, *supra*, at 195, 199 n. 21, 205; *Piper* v. *Chris-Craft Industries, Inc.*, *ante*, at 43 (Rule 10b–6, also promulgated under § 10 (b), is "an antimanipulative provision designed to protect the orderliness of the securities market during distributions of stock" and "to prevent stimulative trading by an issuer in its own securities in order to create an unnatural and unwarranted appearance of market activity"); 2 A. Bromberg, Securities Law: Fraud § 7.3 (1975); 3 L. Loss, Securities Regulation 1541–1570 (2d ed. 1961); 6 *id.*, at 3755–3763 (Supp. 1969). Section 10 (b)'s general prohibition of practices deemed by

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tive misrepresentations in the corporation's annual report and by failing to file any such report the next year). See Recent Cases, 89 Harv. L. Rev. 1917, 1926 (1976) (stating that no appellate decision before that of the Court of Appeals in this case and in *Marshel* v. *AFW Fabric Corp.*, 533 F. 2d 1277 (CA2), vacated and remanded for a determination of mootness, 429 U. S. 881 (1976), "had permitted a 10b–5 claim without some element of misrepresentation or nondisclosure") (footnote omitted).

the SEC to be "manipulative"—in this technical sense of artificially affecting market activity in order to mislead investors—is fully consistent with the fundamental purpose of the 1934 Act " 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* . . . .' " *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972), quoting *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 186 (1963). Indeed, nondisclosure is usually essential to the success of a manipulative scheme. 3 Loss, *supra*, at 1565. No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices. But we do not think it would have chosen this "term of art" if it had meant to bring within the scope of § 10 (b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary.

IV

The language of the statute is, we think, "sufficiently clear in its context" to be dispositive here, *Ernst & Ernst*, *supra*, at 201; but even if it were not, there are additional considerations that weigh heavily against permitting a cause of action under Rule 10b–5 for the breach of corporate fiduciary duty alleged in this complaint. Congress did not expressly provide a private cause of action for violations of § 10 (b). Although we have recognized an implied cause of action under that section in some circumstances, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, *supra*, at 13 n. 9, we have also recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is "unnecessary to ensure the fulfillment of Congress' purposes" in adopting the Act. *Piper* v. *Chris-Craft Industries*, *ante*, at 41. Cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 431–433 (1964). As we noted earlier, *supra*, this page, the Court repeatedly has described the

"fundamental purpose" of the Act as implementing a "philosophy of full disclosure"; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute. Cf. *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 381–385 (1970). As in *Cort* v. *Ash*, 422 U. S. 66, 80 (1975), we are reluctant to recognize a cause of action here to serve what is "at best a subsidiary purpose" of the federal legislation.

A second factor in determining whether Congress intended to create a federal cause of action in these circumstances is "whether 'the cause of action [is] one traditionally relegated to state law . . . .'" *Piper* v. *Chris-Craft Industries, Inc.*, *ante*, at 40, quoting *Cort* v. *Ash*, *supra*, at 78. The Delaware Legislature has supplied minority shareholders with a cause of action in the Delaware Court of Chancery to recover the fair value of shares allegedly undervalued in a short-form merger. See *supra*, at 465–466. Of course, the existence of a particular state-law remedy is not dispositive of the question whether Congress meant to provide a similar federal remedy, but as in *Cort* and *Piper*, we conclude that "it is entirely appropriate in this instance to relegate respondent and others in his situation to whatever remedy is created by state law." 422 U. S., at 84; *ante*, at 41.

The reasoning behind a holding that the complaint in this case alleged fraud under Rule 10b–5 could not be easily contained. It is difficult to imagine how a court could distinguish, for purposes of Rule 10b–5 fraud, between a majority stockholder's use of a short-form merger to eliminate the minority at an unfair price and the use of some other device, such as a long-form merger, tender offer, or liquidation, to achieve the same result; or indeed how a court could distinguish the alleged abuses in these going private transactions from other types of fiduciary self-dealing involving transactions in securities. The result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation. In addition to posing a

"danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b–5," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S., at 740, this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law. Federal courts applying a "federal fiduciary principle" under Rule 10b–5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system.[16] Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. As the Court stated in *Cort* v. *Ash*, *supra:* "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." 422 U. S., at 84 (emphasis added).

We thus adhere to the position that "Congress by § 10 (b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S., at 12. There

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[16] For example, some States apparently require a "valid corporate purpose" for the elimination of the minority interest through a short-form merger, whereas other States do not. Compare *Bryan* v. *Brock & Blevins Co.*, 490 F. 2d 563 (CA5), cert. denied, 419 U. S. 844 (1974) (merger arranged by controlling stockholder for no business purpose except to eliminate 15% minority stockholder violated Georgia short-form merger statute) with *Stauffer* v. *Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A. 2d 78 (1962) (Delaware short-form merger statute allows majority stockholder to eliminate the minority interest without any corporate purpose and subject only to an appraisal remedy). Thus to the extent that Rule 10b–5 is interpreted to require a valid corporate purpose for elimination of minority shareholders as well as a fair price for their shares, it would impose a stricter standard of fiduciary duty than that required by the law of some States.

may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10 (b) and Rule 10b–5 to "cover the corporate universe." [17]

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN dissents and would affirm for substantially the reasons stated in the majority and concurring opinions in the Court of Appeals, 533 F. 2d 1283 (CA2 1976).

MR. JUSTICE BLACKMUN, concurring in part.

Like MR. JUSTICE STEVENS, I refrain from joining Part IV of the Court's opinion. I, too, regard that part as unnecessary for the decision in the instant case and, indeed, as exacerbating the concerns I expressed in my dissents in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 761 (1975), and in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 215 (1976). I, however, join the remainder of the Court's opinion and its judgment.

MR. JUSTICE STEVENS, concurring in part.

For the reasons stated by MR. JUSTICE BLACKMUN in his dissenting opinion in *Blue Chip Stamps* v. *Manor Drug Stores*,

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[17] Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L. J. 663, 700 (1974) (footnote omitted). Professor Cary argues vigorously for comprehensive federal fiduciary standards, but urges a "frontal" attack by a new federal statute rather than an extension of Rule 10b–5. He writes: "It seems anomalous to jig-saw every kind of corporate dispute into the federal courts through the securities acts as they are presently written." *Ibid.* See also Note, Going Private, 84 Yale L. J. 903 (1975) (proposing the application of traditional doctrines of substantive corporate law to problems of fairness raised by "going private" transactions such as short-form mergers).

421 U. S. 723, 761,[1] and those stated in my dissent in *Piper* v. *Chris-Craft Industries, ante,* p. 53, I believe both of those cases were incorrectly decided. I foresee some danger that Part IV of the Court's opinion in this case may incorrectly be read as extending the holdings of those cases. Moreover, the entire discussion in Part IV is unnecessary to the decision of this case. Accordingly, I join only Parts I, II, and III of the Court's opinion. I would also add further emphasis to the fact that the controlling stockholders in this case did not breach any duty owed to the minority shareholders because (a) there was complete disclosure of the relevant facts, and (b) the minority are entitled to receive the fair value of their shares.[2] The facts alleged in the complaint do not constitute "fraud" within the meaning of Rule 10b–5.

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[1] See also *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7 1973), cert. denied, 416 U. S. 960.

[2] The motivation for the merger is a matter of indifference to the minority stockholders because they retain no interest in the corporation after the merger is consummated.

CASTANEDA, SHERIFF *v.* PARTIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75–1552. Argued November 9, 1976—Decided March 23, 1977

Under Texas' "key man" system for selecting grand juries, jury commissioners are appointed by a state district judge to select prospective jurors from different portions of the county, after which the district judge proceeds to test their qualifications. A grand juror, in addition to being a citizen of the State and of the county in which he is to serve and a qualified voter in the county, must be "of sound mind and good moral character," be literate, have no prior felony conviction, and be under no pending indictment or other accusation. After respondent, a Mexican-American, had been convicted of a crime in a Texas District Court and had exhausted his state remedies on his claim of discrimination in the selection of the grand jury that had indicted him, he filed a habeas corpus petition in the Federal District Court, alleging a denial of due process and equal protection under the Fourteenth Amendment, because of gross underrepresentation of Mexican-Americans on the county grand juries. On the basis of the evidence before it, the District Court concluded that respondent had made out a weak prima facie case of invidious discrimination, and, on balance, the court's doubts about the reliability of population and grand jury statistics offered by respondent from census and county records, coupled with its opinion that Mexican-Americans constituted a "governing majority" in the county, caused it further to conclude that the prima facie case was rebutted by the State, and the petition was dismissed. The Court of Appeals reversed, holding that the State had failed to rebut respondent's prima facie case. *Held:* Based on all the facts that bear on the grand jury discrimination issue, such as the statistical disparities (the county population was 79% Mexican-American, but, over an 11-year period, only 39% of those summoned for grand jury service were Mexican-American), the method of jury selection, and any other relevant testimony as to the manner in which the selection process was implemented, the proof offered by respondent was sufficient to demonstrate a prima facie case of intentional discrimination in grand jury selection, and the State failed to rebut such presumption by competent evidence. Pp. 492–501.

(a) None of the evidence in the record rebutted respondent's prima facie case. The State offered only the testimony of the State District

Judge who had selected the jury commissioners, dealing principally with the selection of the commissioners and the instructions given them, and did not call the commissioners themselves to testify. Without evidence about the method by which the commissioners determined the other qualifications for grand jurors prior to the statutory time for testing qualifications, no inference explaining the disparity by reference to the literacy, sound mind, moral character, and criminal record qualifications can be drawn from the statistics about the population as a whole. Pp. 497–499.

(b) Nor did the District Court's "governing majority" theory dispel the presumption of intentional discrimination. Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group. Furthermore, the relevance of a governing majority of elected officials to the grand jury selection process is questionable, and even if a "governing majority" theory has general applicability in cases of this kind, the record in this case is inadequate to permit such an approach. Pp. 499–500.

524 F. 2d 481, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 501. BURGER, C. J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 504. STEWART, J., filed a dissenting opinion, *post*, p. 507. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 507.

Thomas Parker Beery argued the cause and filed a brief for petitioner.

David G. Hall argued the cause for respondent. With him on the brief was *Melvin L. Wulf*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The sole issue presented in this case is whether the State of Texas, in the person of petitioner, the Sheriff of Hidalgo County, successfully rebutted respondent prisoner's prima facie showing of discrimination against Mexican-Americans

in the state grand jury selection process. In his brief, petitioner, in claiming effective rebuttal, asserts:

> "This list [of the grand jurors that indicted respondent] indicates that 50 percent of the names appearing thereon were Spanish. The record indicates that 3 of the 5 jury commissioners, 5 of the grand jurors who returned the indictment, 7 of the petit jurors, the judge presiding at the trial, and the Sheriff who served notice on the grand jurors to appear had Spanish surnames." Brief for Petitioner 6.

I

This Court on prior occasions has considered the workings of the Texas system of grand jury selection. See *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Akins* v. *Texas*, 325 U. S. 398 (1945); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940). Texas employs the "key man" system, which relies on jury commissioners to select prospective grand jurors from the community at large.[1] The procedure begins with the state district judge's appointment of from three to five persons to serve as jury commissioners. Tex. Code Crim. Proc., Art. 19.01 (1966).[2] The commissioners then "shall select not less than 15 nor more than 20 persons from the citizens of different portions of the county" to compose the list from which the actual grand jury will be drawn. Art. 19.06 (Supp. 1976–1977).[3] When at least 12 of the persons on the list appear in

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[1] The other principal state mode of juror selection is a random method similar to that used in the federal system. See 28 U. S. C. § 1864. See generally Sperlich & Jaspovice, Grand Juries, Grand Jurors and the Constitution, 1 Hastings Const. L. Q. 63, 68 (1974).

[2] During the time period covered by this case, the statute was amended to omit the requirement that the commissioners be freeholders in the county. 1971 Tex. Gen. Laws, c. 131, § 1. That change has no bearing on the issues before us.

[3] Prior to 1965, the law directed the commissioners to select "sixteen

court pursuant to summons, the district judge proceeds to "test their qualifications." Art. 19.21. The qualifications themselves are set out in Art. 19.08: A grand juror must be a citizen of Texas and of the county, be a qualified voter in the county, be "of sound mind and good moral character," be literate, have no prior felony conviction, and be under no pending indictment "or other legal accusation for theft or of any felony." Interrogation under oath is the method specified for testing the prospective juror's qualifications. Art. 19.22. The precise questions to be asked are set out in Art. 19.23, which, for the most part, tracks the language of Art. 19.08. After the court finds 12 jurors who meet the statutory qualifications, they are impaneled as the grand jury. Art. 19.26.

II

Respondent, Rodrigo Partida, was indicted in March 1972 by the grand jury of the 92d District Court of Hidalgo County for the crime of burglary of a private residence at night with intent to rape. Hidalgo is one of the border counties of southern Texas. After a trial before a petit jury, respondent was convicted and sentenced to eight years in the custody of the Texas Department of Corrections. He first raised his claim of discrimination in the grand jury selection process on a motion for new trial in the State District Court.[4] In sup-

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men." The legislature amended the statute that year to substitute the words "twenty persons" for "sixteen men." 1965 Tex. Gen. Laws, c. 722, p. 317. In 1967, the law was amended again to provide the present range of from 15 to 20 persons. 1967 Tex. Gen. Laws, c. 515, § 1. These changes in the number of persons required to be on the list account for the jump from 16 to 20 in the grand jury list statistics set forth in n. 7, *infra*.

[4] In the state courts and in the federal courts on habeas, the State argued that respondent's challenge was not timely raised as a matter of state procedure, and therefore that he waived any complaint of this kind that he might have. Since the Texas courts considered the claim on its merits, however, we are free to do so here. See *Coleman* v. *Alabama*, 377 U. S. 129 (1964); cf. *Francis* v. *Henderson*, 425 U. S. 536, 542 n. 5

port of his motion, respondent testified about the general existence of discrimination against Mexican-Americans in that area of Texas and introduced statistics from the 1970 census and the Hidalgo County grand jury records. The census figures show that in 1970, the population of Hidalgo County was 181,535. United States Bureau of the Census, 1970 Census of Population, Characteristics of the Population, vol. 1, pt. 45, § 1, Table 119, p. 914. Persons of Spanish language or Spanish surname totaled 143,611. *Ibid.*, and *id.*, Table 129, p. 1092.[5] On the assumption that all the persons of Spanish language or Spanish surname were Mexican-Americans, these figures show that 79.1% of the county's population was Mexican-American.[6]

(1976). Furthermore, petitioner abandoned the waiver point in his petition for certiorari.

[5] For our purposes, the terms "Spanish-surnamed" and "Mexican-American" are used as synonyms for the census designation "Persons of Spanish Language or Spanish Surname." Persons of Spanish language include both those whose mother tongue is Spanish and all other persons in families in which the head of the household or spouse reported Spanish as the mother tongue. Persons of Spanish surname, as the census uses that term, are determined by reference to a list of 8,000 Spanish surnames compiled by the Immigration and Naturalization Service. For Texas, social and economic characteristics are presented for persons of Spanish language combined with all other persons of Spanish surname in the census reports. United States Bureau of the Census, 1970 Census of Population, Characteristics of the Population, vol. 1, pt. 45, § 2, App. B.

[6] At oral argument, counsel for petitioner appears to have suggested that the presence of illegal aliens who have Spanish surnames might inflate the percentage of Mexican-Americans in the county's population. Tr. of Oral Arg. 10–12. We cannot agree that the presence of noncitizens makes any practical difference. Table 119 of the census breaks down the 181,535 people who composed the total county population into three groups: native of native parentage, native of foreign parentage, and foreign born. The only persons as to whom the assumption of noncitizenship would be logically sustainable are the foreign born. Even for them, it is probable that some were naturalized citizens. Furthermore, only 22,845 persons were in the "foreign born" category. If those persons are excluded from

Respondent's data compiled from the Hidalgo County grand jury records from 1962 to 1972 showed that over that period, the average percentage of Spanish-surnamed grand jurors was 39%.[7] In the 2½-year period during which the District Judge who impaneled the jury that indicted respondent was in charge, the average percentage was 45.5%. On the list from which the grand jury that indicted respondent was selected, 50% were Spanish surnamed. The last set of data that respondent introduced, again from the 1970 census, illustrated a number of ways in which Mexican-Americans tend to be underprivileged, including poverty-level incomes, less desirable jobs, substandard housing, and lower levels of

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the population of the county, the total becomes 158,690. Assuming that every foreign-born person was counted as a Spanish-surnamed person (an assumption that favors the State), the total number of Mexican-Americans is reduced from 143,611 to 120,766. Using these adjusted figures, Mexican-Americans constitute 76.1% of the county's population, a figure only 3%, and thus negligibly, smaller than the one used throughout this litigation. For consistency, we shall continue to refer to the population figures for the entire county, particularly since the State has not shown why those figures are unreliable.

[7] The statistics for grand jury composition can be organized as follows:

Year	No. persons on grand jury list	Av. No. Spanish surnamed per list	Percentage Spanish surnamed
1962	16	6	37.5%
1963	16	5.75	35.9%
1964	16	4.75	29.7%
1965	16.2	5	30.9%
1966	20	7.5	37.5%
1967	20.25	7.25	35.8%
1968	20	6.6	33%
1969	20	10	50%
1970	20	8	40%
1971	20	9.4	47%
1972	20	10.5	52.5%

Of the 870 persons who were summoned to serve as grand jurors over the 11-year period, 339, or 39%, were Spanish surnamed. See table showing Hidalgo County grand jury panels from 1962 to 1972, App. 17–18.

education.[8] The State offered no evidence at all either attacking respondent's allegations of discrimination or demonstrating that his statistics were unreliable in any way.

[8] At oral argument, counsel for petitioner suggested that the data regarding educational background explained the discrepancy between the percentage of Mexican-Americans in the total population and the percentage on the grand jury lists. Tr. of Oral Arg. 8. For a variety of reasons, we cannot accept that suggestion. First, under the Texas method of selecting grand jurors, qualifications are not tested until the persons on the list appear in the District Court. Prior to that time, assuming an unbiased selection procedure, persons of all educational characteristics should appear on the list. If the jury commissioners actually exercised some means of winnowing those who lacked the ability to read and write, it was incumbent on the State to call the commissioners and to have them explain how this was done. In the absence of any evidence in the record to this effect, we shall not assume that the only people excluded from grand jury service were the illiterate.

Second, it is difficult to draw valid inferences from the raw census data, since the data are incomplete in some places and the definition of "literacy" would undoubtedly be the subject of some dispute in any event. The State's failure to discuss the literacy problem at any point prior to oral argument compounds the difficulties. One gap in the data occurs with respect to the younger persons in the jury pool. The census reports for educational background cover only those who are 25 years of age and above. Yet the only age limitation on eligibility for grand jury service is qualification to vote. Tex. Code Crim. Proc., Art. 19.08 (Supp. 1976–1977). During the period to which the census figures apply, a person became qualified to vote at age 21. Tex. Elec. Code, Art. 5.01 (1967). (In 1975, Art. 5.01 was amended to give the franchise to all persons 18 and over. 1975 Tex. Gen. Laws, c. 682, § 3.) It is not improbable that the educational characteristics of persons in the younger age group would prove to be favorable to Mexican-Americans.

Finally, even assuming that the statistics for persons age 25 and over are sufficiently representative to be useful, a significant discrepancy still exists between the number of Spanish-surnamed people and the level of representation on grand jury lists. Table 83 of the 1970 census shows that of a total of 80,049 persons in that age group, 13,205 have no schooling. (Data for McAllen-Pharr-Edinburg Standard Metropolitan Statistical Area. This SMSA is identical to Hidalgo County.) Table 97 shows that of the 55,949 Spanish-surnamed persons in the group, 12,817 have no schooling. This means that of the 24,100 persons of all other races and ethnic groups,

The State District Court, nevertheless, denied the motion for a new trial.

On appeal, the Texas Court of Criminal Appeals affirmed the conviction. *Partida* v. *State*, 506 S. W. 2d 209 (1974). Reaching the merits of the claim of grand jury discrimination, the court held that respondent had failed to make out a prima facie case. In the court's view, he should have shown how many of the females who served on the grand juries were Mexican-Americans married to men with Anglo-American surnames, how many Mexican-Americans were excused for reasons of age or health, or other legal reasons, and how many

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388 have no schooling. Translated into percentages, 22.9% of the Spanish-surnamed persons have no schooling, and 1.6% of the others have no schooling. This means that 43,132 of the Spanish-surnamed persons have some schooling and 23,712 of the others have some schooling. The Spanish-surnamed persons thus represent 65% of the 66,844 with some schooling, and the others 35%. The 65% figure still creates a significant disparity when compared to the 39% representation on grand juries shown over the 11-year period involved here.

The suggestion is made in the dissenting opinion of THE CHIEF JUSTICE, *post*, at 504–506, that reliance on eligible population figures and allowance for literacy would defeat respondent's prima facie showing of discrimination. But the 65% to 39% disparity between Mexican-Americans *over* the age of 25 who have some schooling and Mexican-Americans represented on the grand jury venires takes both of THE CHIEF JUSTICE's concerns into account. Statistical analysis, which is described in more detail in n. 17, *infra*, indicates that the discrepancy is significant. If one assumes that Mexican-Americans constitute only 65% of the jury pool, then a detailed calculation reveals that the likelihood that so substantial a discrepancy would occur by chance is less than 1 in 10^{50}.

We prefer not to rely on the 65% to 39% disparity, however, since there are so many implicit assumptions in this analysis, and we consider it inappropriate for us, as an appellate tribunal, to undertake this kind of inquiry without a record below in which those assumptions were tested. We rest, instead, on the fact that the record does not show any way by which the educational characteristics are taken into account in the compilation of the grand jury lists, since the procedure established by the State provides that literacy is tested only after the group of 20 are summoned.

of those listed by the census would not have met the statutory qualifications of citizenship, literacy, sound mind, moral character, and lack of criminal record or accusation. *Id.*, at 210–211. Quite beyond the uncertainties in the statistics, the court found it impossible to believe that discrimination could have been directed against a Mexican-American, in light of the many elective positions held by Mexican-Americans in the county and the substantial representation of Mexican-Americans on recent grand juries.[9] *Id.*, at 211. In essence, the court refused to presume that Mexican-Americans would discriminate against their own kind.

After exhausting his state remedies, respondent filed his petition for habeas corpus in the Federal District Court, alleging a denial of due process and equal protection, guaranteed by the Fourteenth Amendment, because of gross underrepresentation of Mexican-Americans on the Hidalgo County grand juries. At a hearing at which the state transcript was introduced, petitioner presented the testimony of the state judge who selected the jury commissioners who had compiled the list from which respondent's grand jury was taken. The judge first reviewed the State's grand jury selection process. In selecting the jury commissioners, the judge stated that he tried to appoint a greater number of Mexican-Americans than members of other ethnic groups. He testified that he instructed the commissioners about the qualifications of a grand juror and the exemptions provided by law. The record is silent, however, with regard to instructions dealing with the potential problem of discrimination directed against any identifiable group. The judge admitted that the actual re-

[9] The court noted that the foreman of the grand jury that indicted respondent was Mexican-American, and that 10 of the 20 summoned to serve had Spanish surnames. Seven of the 12 members of the petit jury that convicted him were Mexican-American. In addition, the state judge who presided over the trial was Mexican-American, as were a number of other elected officials in the county.

sults of the selection process had not produced grand jury lists that were "representative of the ethnic balance in the community." [10] App. 84. The jury commissioners themselves, who were the only ones in a position to explain the apparent substantial underrepresentation of Mexican-Americans and to provide information on the actual operation of the selection process, were never called.

On the basis of the evidence before it, the court concluded that respondent had made out a *"bare prima facie* case" of invidious discrimination with his proof of "a long continued disproportion in the composition of the grand juries in Hidalgo County." 384 F. Supp. 79, 90 (SD Tex. 1974) (emphasis in original). Based on an examination of the reliability of the statistics offered by respondent, however, despite the lack of evidence in the record justifying such an inquiry, the court stated that the prima facie case was weak. The court believed that the census statistics did not reflect the true situation accurately, because of recent changes in the Hidalgo County area and the court's own impression of the demographic characteristics of the Mexican-American community. On the other hand, the court recognized that the Texas key-man system of grand jury selection was highly subjective, and was "archaic and inefficient," *id.*, at 91, and that this was a factor arguing for less tolerance in the percentage differences. On balance, the court's doubts about the reliability of the statistics, coupled with its opinion that Mexican-Americans constituted a "governing majority" in the county, caused it to conclude that the prima facie case was rebutted. The "gov-

[10] The Federal District Judge observed, during the state judge's testimony, that the selection process for grand jurors in Hidalgo County typically resulted in a progressive reduction of the number of Mexican-Americans involved at each stage. See *Alexander* v. *Louisiana,* 405 U. S. 625 (1972). For example, said the court, if 60% of the jury commissioners were Mexican-American, the jury panel might be only 55%, and the actual grand jury only 43%. The court speculated that the reason for this might be cultural. App. 84–85.

erning majority" theory distinguished respondent's case from all preceding cases involving similar disparities. On the basis of those findings, the court dismissed the petition.[11]

The United States Court of Appeals for the Fifth Circuit reversed. 524 F. 2d 481 (1975). It agreed with the District Court that respondent had succeeded in making out a prima facie case. It found, however, that the State had failed to rebut that showing. The "governing majority" theory contributed little to the State's case in the absence of specific proof to explain the disparity. In light of the State's abdication of its responsibility to introduce controverting evidence, the court held that respondent was entitled to prevail.

We granted certiorari to consider whether the existence of a "governing majority" in itself can rebut a prima facie case of discrimination in grand jury selection, and, if not, whether the State otherwise met its burden of proof. 426 U. S. 934 (1976).

III

A. This Court has long recognized that "it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded by the State . . . ." [12] *Hernandez* v. *Texas*, 347 U. S., at 477. See

[11] The court suggested that the actual discrimination operating might be economic. The jury commissioners were from the higher socio-economic classes, and they tended to select prospective jurors from among their peers. Consequently, the number of Mexican-Americans was disproportionately low, since they were concentrated at the lower end of the economic scale. We find it unnecessary to decide whether a showing of simple economic discrimination would be enough to make out a prima facie case in the absence of other evidence, since that case is not before us. Cf. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946).

[12] Cases in this Court holding unconstitutional discriminatory selection procedures in the grand jury context include *Alexander* v. *Louisiana*, *supra*;

Alexander v. *Louisiana*, 405 U. S. 625, 628 (1972); *Carter* v. *Jury Comm'n*, 396 U. S. 320, 330 (1970). See also *Peters* v. *Kiff*, 407 U. S. 493, 497 (1972) (plurality opinion); *id.*, at 507 (dissenting opinion). While the earlier cases involved absolute exclusion of an identifiable group, later cases established the principle that substantial underrepresentation of the group constitutes a constitutional violation as well, if it results from purposeful discrimination. See *Turner* v. *Fouche*, 396 U. S. 346 (1970); *Carter* v. *Jury Comm'n*, *supra*; *Whitus* v. *Georgia*, 385 U. S. 545, 552 (1967); *Swain* v. *Alabama*, 380 U. S. 202 (1965); *Cassell* v. *Texas*, 339 U. S. 282 (1950). Recent cases have established the fact that an official act is not unconstitutional *solely* because it has a racially disproportionate impact. *Washington* v. *Davis*, 426 U. S. 229, 239 (1976); see *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264–265 (1977). Nevertheless, as the Court recognized in *Arlington Heights*, "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.*, at 266. In *Washington* v. *Davis*, the application of these principles to the jury cases was considered:

> "It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.' . . . A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a commu-

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Arnold v. *North Carolina*, 376 U. S. 773 (1964); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Carter* v. *Texas*, 177 U. S. 442 (1900); and *Bush* v. *Kentucky*, 107 U. S. 110 (1883).

> nity, . . . or with racially non-neutral selection procedures . . . . With a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' *Alexander* [v. *Louisiana*, 405 U. S.,] at 632." 426 U. S., at 241.

See *Arlington Heights*, *supra*, at 266 n. 13.

Thus, in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez* v. *Texas*, 347 U. S., at 478–479. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. *Id.*, at 480. See *Norris* v. *Alabama*, 294 U. S. 587 (1935). This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class.[13] *Hernandez* v. *Texas*, 347 U. S., at 480. Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. *Washington* v. *Davis*, 426 U. S., at 241; *Alexander* v. *Louisiana*, 405 U. S., at 630.

[13] The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266 n. 13 (1977); *Washington* v. *Davis*, 426 U. S. 229, 241 (1976); *Eubanks* v. *Louisiana*, 356 U. S., at 587; *Smith* v. *Texas*, 311 U. S., at 131. Cf. n. 17, *infra*.

Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

B. In this case, it is no longer open to dispute that Mexican-Americans are a clearly identifiable class. See, *e. g.*, *Hernandez* v. *Texas*, *supra*. Cf. *White* v. *Regester*, 412 U. S. 755, 767 (1973). The statistics introduced by respondent from the 1970 census illustrate disadvantages to which the group has been subject. Additionally, as in *Alexander* v. *Louisiana*, the selection procedure is not racially neutral with respect to Mexican-Americans; Spanish surnames are just as easily identifiable as race was from the questionnaires in *Alexander* or the notations and card colors in *Whitus* v. *Georgia*, *supra*, and in *Avery* v. *Georgia*, 345 U. S. 559 (1953).[14]

The disparity proved by the 1970 census statistics showed that the population of the county was 79.1% Mexican-American, but that, over an 11-year period, only 39% of the persons summoned for grand jury service were Mexican-American.[15] This difference of 40% is greater than that found significant in *Turner* v. *Fouche*, 396 U. S. 346 (1970)

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[14] The dissenters argue that the subjectivity of the system cuts in favor of the State where those who control the selection process are members of the same class as the person claiming discrimination. The fact remains, however, that the class to which respondent belongs was substantially underrepresented on the grand jury lists of Hidalgo County. The dissenters' argument here is another aspect of the "governing majority" theory, see Part III–C, *infra;* under the circumstances presented in this case, that theory does not dispel the presumption of purposeful discrimination created by the combined force of the statistical showing and the highly subjective method of selection.

[15] Since the 1960 census did not compile separate statistics for Spanish-surnamed persons, it is impossible to ascertain whether the percentage of Mexican-Americans in the county changed appreciably over the period of time at issue. We therefore are forced to rely on the assumption that the 79.1% figure remained constant.

(60% Negroes in the general population, 37% on the grand jury lists). Since the State presented no evidence showing why the 11-year period was not reliable, we take it as the relevant base for comparison.[16] The mathematical disparities that have been accepted by this Court as adequate for a prima facie case have all been within the range presented here. For example, in *Whitus* v. *Georgia*, 385 U. S. 545 (1967), the number of Negroes listed on the tax digest amounted to 27.1% of the taxpayers, but only 9.1% of those on the grand jury venire. The disparity was held to be sufficient to make out a prima facie case of discrimination. See *Sims* v. *Georgia*, 389 U. S. 404 (1967) (24.4% of tax lists, 4.7% of grand jury lists); *Jones* v. *Georgia*, 389 U. S. 24 (1967) (19.7% of tax lists, 5% of jury list). We agree with the District Court and the Court of Appeals that the proof in this case was enough to establish a prima facie case of discrimination against the Mexican-Americans in the Hidalgo County grand jury selection.[17]

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[16] Statistical analysis of the grand jury lists during the 2½-year tenure of the State District Judge who selected the commissioners in respondent's case reveals that a significant disparity existed over this time period as well. See n. 17, *infra*. Thus, the District Court's assumption that reference to a shorter time period would show that the prima facie case of discrimination could not be proved was unwarranted.

[17] If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial distribution. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338, 353–356 (1966). See generally P. Hoel, Introduction to Mathematical Statistics 58–61, 79–86 (4th ed. 1971); F. Mosteller, R. Rourke, & G. Thomas, Probability with Statistical Applications 130–146, 270–291 (2d ed. 1970). Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. See F. Mosteller, R. Rourke, & G. Thomas, *supra*, at 270–290. The measure of

Supporting this conclusion is the fact that the Texas system of selecting grand jurors is highly subjective. The facial constitutionality of the key-man system, of course, has been accepted by this Court. See, *e. g.*, *Carter* v. *Jury Comm'n*, 396 U. S. 320 (1970); *Akins* v. *Texas*, 325 U. S. 398 (1945); *Smith* v. *Texas*, 311 U. S. 128 (1940). Nevertheless, the Court has noted that the system is susceptible of abuse as applied.[18] See *Hernandez* v. *Texas*, 347 U. S., at 479. Additionally, as noted, persons with Spanish surnames are readily identifiable.

The showing made by respondent therefore shifted the burden of proof to the State to dispel the inference of in-

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the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). *Id.*, at 213. Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations. A detailed calculation reveals that the likelihood that such a substantial depature from the expected value would occur by chance is less than 1 in 10^{140}.

The data for the 2½-year period during which the State District Judge supervised the selection process similarly support the inference that the exclusion of Mexican-Americans did not occur by chance. Of 220 persons called to serve as grand jurors, only 100 were Mexican-Americans. The expected Mexican-American representation is approximately 174 and the standard deviation, as calculated from the binomial model, is approximately six. The discrepancy between the expected and observed values is more than 12 standard deviations. Again, a detailed calculation shows that the likelihood of drawing not more than 100 Mexican-Americans by chance is negligible, being less than 1 in 10^{25}.

[18] It has been said that random selection methods similar to the federal system would probably avoid most of the potential for abuse found in the key-man system. See Sperlich & Jaspovice, *supra*, n. 1.

tentional discrimination. Inexplicably, the State introduced practically no evidence. The testimony of the State District Judge dealt principally with the selection of the jury commissioners and the instructions given to them. The commissioners themselves were not called to testify. A case such as *Swain* v. *Alabama*, 380 U. S., at 207 n. 4, 209, illustrates the potential usefulness of such testimony, when it sets out in detail the procedures followed by the commissioners.[19] The opinion of the Texas Court of Criminal Appeals is particularly revealing as to the lack of rebuttal evidence in the record:

> "How many of those listed in the census figures with Mexican-American names were not citizens of the state, but were so-called 'wet-backs' from the south side of the Rio Grande; how many were migrant workers and not residents of Hidalgo County; how many were illiterate and could not read and write; how many were not of sound mind and good moral character; how many had been convicted of a felony or were under indictment or legal accusation for theft or a felony; *none of these facts appear in the record.*" 506 S. W. 2d, at 211 (emphasis added).

In fact, the census figures showed that only a small part of the population reported for Hidalgo County was not native born. See n. 6, *supra*. Without some testimony from the grand jury commissioners about the method by which they determined the other qualifications for grand jurors prior to the statutory time for testing qualifications, it is impossible

[19] This is not to say, of course, that a simple protestation from a commissioner that racial considerations played no part in the selection would be enough. This kind of testimony has been found insufficient on several occasions. *E. g., Alexander* v. *Louisiana*, 405 U. S., at 632; *Hernandez* v. *Texas*, 347 U. S. 475, 481 (1954); *Norris* v. *Alabama*, 294 U. S. 587, 598 (1935). Neither is the State entitled to rely on a presumption that the officials discharged their sworn duties to rebut the case of discrimination. *Jones* v. *Georgia*, 389 U. S. 24 (1967).

to draw any inference about literacy, sound mind and moral character, and criminal record from the statistics about the population as a whole. See n. 8, *supra*. These are questions of disputed fact that present problems not amenable to resolution by an appellate court. We emphasize, however, that we are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case. See *Turner* v. *Fouche*, 396 U. S., at 361.

C. In light of our holding that respondent proved a prima facie case of discrimination that was not rebutted by any of the evidence presently in the record, we have only to consider whether the District Court's "governing majority" theory filled the evidentiary gap. In our view, it did not dispel the presumption of purposeful discrimination in the circumstances of this case. Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group. Indeed, even the dissent of MR. JUSTICE POWELL does not suggest that such a presumption would be appropriate. See *post*, at 514–516, n. 6, 516 n. 7. The problem is a complex one, about which widely differing views can be held, and, as such, it would be somewhat precipitate to take judicial notice of one view over another on the basis of a record as barren as this.[20]

Furthermore, the relevance of a governing majority of elected officials to the grand jury selection process is questionable. The fact that certain elected officials are Mexican-American demonstrates nothing about the motivations and methods of the grand jury commissioners who select persons for grand jury lists. The only arguably relevant fact in this

[20] This is not a case where a majority is practicing benevolent discrimination in favor of a traditionally disfavored minority, although that situation illustrates that motivations not immediately obvious might enter into discrimination against "one's own kind."

record on the issue is that three of the five jury commissioners in respondent's case were Mexican-American. Knowing only this, we would be forced to rely on the reasoning that we have rejected—that human beings would not discriminate against their own kind—in order to find that the presumption of purposeful discrimination was rebutted. Without the benefit of this simple behavioral presumption, discriminatory intent can be rebutted only with evidence in the record about the way in which the commissioners operated and their reasons for doing so. It was the State's burden to supply such evidence, once respondent established his prima facie case. The State's failure in this regard leaves unchallenged respondent's proof of purposeful discrimination.

Finally, even if a "governing majority" theory has general applicability in cases of this kind, the inadequacy of the record in this case does not permit such an approach. Among the evidentiary deficiencies are the lack of any indication of how long the Mexican-Americans have enjoyed "governing majority" status, the absence of information about the relative power inherent in the elective offices held by Mexican-Americans, and the uncertain relevance of the general political power to the specific issue in this case. Even for the most recent time period, when presumably the political power of Mexican-Americans was at its greatest, the discrepancy between the number of Mexican-Americans in the total population and the number on the grand jury lists was substantial. Thus, under the facts presented in this case, the "governing majority" theory is not developed fully enough to satisfy the State's burden of rebuttal.

IV

Rather than relying on an approach to the jury discrimination question that is as faintly defined as the "governing majority" theory is on this record, we prefer to look at all the facts that bear on the issue, such as the statistical disparities, the method of selection, and any other relevant testimony as

to the manner in which the selection process was implemented. Under this standard, the proof offered by respondent was sufficient to demonstrate a prima facie case of discrimination in grand jury selection. Since the State failed to rebut the presumption of purposeful discrimination by competent testimony, despite two opportunities to do so, we affirm the Court of Appeals' holding of a denial of equal protection of the law in the grand jury selection process in respondent's case.

It is so ordered.

MR. JUSTICE MARSHALL, concurring.

I join fully MR. JUSTICE BLACKMUN's sensitive opinion for the Court. I feel compelled to write separately, however, to express my profound disagreement with the views expressed by MR. JUSTICE POWELL in his dissent.

As my Brother POWELL observes, *post*, at 507–508, there are three categories of evidence in this case that bear on the ultimate question whether respondent "demonstrated by a preponderance of the evidence that the State had 'deliberately and systematically den[ied] to members of [respondent's class] the right to participate as jurors in the administration of justice,' " *post*, at 517, quoting *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629 (1972). First, there is the statistical evidence. That evidence reveals that for at least 10 years, Mexican-Americans have been grossly underrepresented on grand juries in Hidalgo County. As MR. JUSTICE BLACKMUN demonstrates, *ante*, at 496–497, n. 17, it is all but impossible that this sizable disparity was produced by chance. The statistical evidence, then, at the very least supports an inference that Mexican-Americans were discriminated against in the choice of grand jurors.

Second, there is testimony concerning the grand jury selection system employed in this case. That testimony indicates that the commissioners who constructed the grand jury panels

had ample opportunity to discriminate against Mexican-Americans, since the selection system is entirely discretionary and since Spanish-surnamed persons are readily identified. Indeed, for over 35 years this Court has recognized the potential for abuse inherent in the Texas grand jury selection plan. See *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Hill* v. *Texas*, 316 U. S. 400, 404 (1942); *Cassell* v. *Texas*, 339 U. S. 282, 289 (1950); *Hernandez* v. *Texas*, 347 U. S. 475, 479 (1954). Thus the testimony concerning the selection system, by itself, only buttresses the inference of purposeful discrimination suggested by the statistics.

In every other case of which I am aware where the evidence showed both statistical disparity and discretionary selection procedures, this Court has found that a prima facie case of discrimination was established, and has required the State to explain how ostensibly neutral selection procedures had produced such nonneutral results. This line of cases begins with the decision almost a century ago in *Neal* v. *Delaware*, 103 U. S. 370 (1881), and extends to our recent decision in *Alexander* v. *Louisiana*, *supra*.[1] Yet my Brother POWELL would have us conclude that the evidence here was insufficient to establish purposeful discrimination, even though no explanation has been offered for the marked underrepresentation of Mexican-Americans on Hidalgo County grand juries.

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[1] See also *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hale* v. *Kentucky*, 303 U. S. 613 (1938); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967); *Sims* v. *Georgia*, 389 U. S. 404 (1967); *Turner* v. *Fouche*, 396 U. S. 346 (1970).

In *Akins* v. *Texas*, 325 U. S. 398 (1945), the statistical evidence involved only two grand jury panels; in *Swain* v. *Alabama*, 380 U. S. 202 (1965), the statistical disparity was small, and the methods of selection were explained.

The sole basis for MR. JUSTICE POWELL's conclusion lies in the third category of evidence presented: proof of "the political dominance and control by the Mexican-American majority in Hidalgo County," *post*, at 507–508. Like the District Court, he appears to assume—without any basis in the record—that *all* Mexican-Americans, indeed *all* members of *all* minority groups, have an "inclination to assure fairness" to other members of their group. *Post*, at 516. Although he concedes the possibility that minority group members will violate this "inclination," see *post*, at 514–515, n. 6, he apparently regards this possibility as more theoretical than real. Thus he would reject the inference of purposeful discrimination here absent any alternative explanation for the disparate results. I emphatically disagree.

In the first place, MR. JUSTICE POWELL's assumptions about human nature, plausible as they may sound, fly in the face of a great deal of social science theory and research. Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority.[2] Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.[3]

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[2] G. Allport, The Nature of Prejudice 150–153 (1954); A. Rose, The Negro's Morale 85–95 (1949); G. Simpson & J. Yinger, Racial and Cultural Minorities 192–195, 227, 295 (4th ed. 1972); Bettelheim, Individual and Mass Behavior in Extreme Situations, 38 J. Abnormal & Social Psych. 417 (1943); cf. *Brown* v. *Board of Education*, 347 U. S. 483, 494, and n. 11 (1954) (noting the impact on sense of self of *de jure* segregation in schools).

[3] E. Frazier, Black Bourgeoisie 213–216 (1957); Simpson & Yinger, *supra*, at 209; A. Kardiner & L. Ovesey, The Mark of Oppression 313–316 (1962); Lewin, Self-Hatred Among Jews, 4 Contemporary Jewish Record 219 (1941).

But even if my Brother POWELL's behavioral assumptions were more valid, I still could not agree to making them the foundation for a constitutional ruling. It seems to me that especially in reviewing claims of intentional discrimination, this Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups. If history has taught us anything, it is the danger of relying on such stereotypes. The question for decision here is not how Mexican-Americans treat other Mexican-Americans, but how the particular grand jury commissioners in Hidalgo County acted. The only reliable way to answer that question, as we have said so many times,[4] is for the State to produce testimony concerning the manner in which the selection process operated. Because the State failed to do so after respondent established a prima facie case of discrimination, I join the Court's opinion affirming the Court of Appeals.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

In addition to the views expressed in MR. JUSTICE POWELL's dissent, I identify one other flaw in the Court's opinion. What the majority characterizes as a prima facie case of discrimination simply will not "wash." The decisions of this Court suggest, and common sense demands, that *eligible* population statistics, not gross population figures, provide the relevant starting point. In *Alexander* v. *Louisiana*, 405 U. S. 625, 630 (1972), for example, the Court in an opinion by MR. JUSTICE WHITE looked to the "proportion of blacks in the *eligible* population . . . ." (Emphasis supplied.)

The failure to produce evidence relating to the eligible population in Hidalgo County undermines respondent's claim that any statistical "disparity" existed in the first instance. Particularly where, as here, substantial numbers of members

[4] *E. g., Norris* v. *Alabama, supra,* at 592; *Pierre* v. *Louisiana, supra,* at 361; *Alexander* v. *Louisiana,* 405 U. S., at 631.

of the identifiable class actually served on grand jury panels, the burden rightly rests upon the challenger to show a meaningful statistical disparity. After all, the presumption of constitutionality attaching to all state procedures has even greater force under the circumstances presented here, where exactly one-half the members of the grand jury list now challenged by respondent were members of the allegedly excluded class of Mexican-Americans.

The Court has not previously been called upon to deal at length with the sort of statistics required of persons challenging a grand jury selection system. The reason is that in our prior cases there was little doubt that members of identifiable minority groups had been excluded in large numbers. In *Alexander* v. *Louisiana, supra,* the challenger's venire included only one member of the identifiable class and the grand jury that indicted him had none. In *Turner* v. *Fouche,* 396 U. S. 346 (1970); *Jones* v. *Georgia,* 389 U. S. 24 (1967); *Sims* v. *Georgia,* 389 U. S. 404 (1967); and *Whitus* v. *Georgia,* 385 U. S. 545 (1967), there was at best only token inclusion of Negroes on grand jury lists. The case before us, in contrast, involves neither tokenism nor absolute exclusion; rather, the State has used a selection system resulting in the inclusion of large numbers of Spanish-surnamed citizens on grand jury lists. In this situation, it is particularly incumbent on respondent to adduce precise statistics demonstrating a significant disparity. To do that, respondent was obligated to demonstrate that disproportionately large numbers of eligible individuals were excluded systematically from grand jury service.

Respondent offered no evidence whatever in this respect. He therefore could not have established any meaningful case of discrimination, prima facie or otherwise. In contrast to respondent's approach, which the Court's opinion accepts without analysis, the Census Bureau's statistics for 1970 demonstrate that of the *adults* in Hidalgo County, 72%, not

79.1% as respondent implies, are Spanish surnamed. At the outset, therefore, respondent's gross population figures are manifestly overinclusive.

But that is only the beginning. Respondent offered no evidence whatever with respect to other basic qualifications for grand jury service.[1] The statistics relied on in the Court's opinion suggest that 22.9% of Spanish-surnamed persons over age 25 in Hidalgo County have had no schooling at all. *Ante*, at 488–489, n. 8. Since one requirement of grand jurors in Texas is literacy in the English language, approximately 20% of adult-age Mexican-Americans are very likely disqualified on that ground alone.

The Court's reliance on respondent's overbroad statistics is not the sole defect. As previously noted, one-half of the members of respondent's grand jury list bore Mexican-American surnames. Other grand jury lists at about the same time as respondent's indictment in March 1972 were *predominantly Mexican-American*. Thus, with respect to the September 1971 grand jury list, 70% of the prospective grand jurors were Mexican-American. In the January 1972 Term, 55% were Mexican-American. Since respondent was indicted in 1972, by what appears to have been a truly representative grand jury, the mechanical use of Hidalgo County's practices some 10 years earlier seems to me entirely indefensible. We do not know, and on this record we cannot know, whether respondent's 1970 gross population figures, which served as the basis for establishing the "disparity" complained of in this case, had any applicability at all to the period prior to 1970. Accordingly, for all we know, the 1970 figures may be totally

[1] The burden of establishing a prima facie case obviously rested on respondent. It will not do to produce patently overinclusive figures and thereby seek to shift the burden to the State. Cf. *ante*, at 486–487, n. 6, 488–489, n. 8. Rather, a prima facie case is established only when the challenger shows a disparity between the percentage of minority persons in the eligible population and the percentage of minority individuals on the grand jury.

inaccurate as to prior years;[2] if so, the apparent disparity alleged by respondent would be increased improperly.

Therefore, I disagree both with the Court's assumption that respondent established a prima facie case and with the Court's implicit approval of respondent's method for showing an allegedly disproportionate impact of Hidalgo County's selection system upon Mexican-Americans.

MR. JUSTICE STEWART, dissenting.

In my view, the findings of the District Court in this case cannot be said to be "clearly erroneous." Fed. Rule Civ. Proc. 52 (a); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395.* Given those findings, there was no constitutional violation in the selection of the grand jury that indicted the respondent. Upon that basis I would reverse the judgment of the Court of Appeals. I add only that I am in substantial agreement with the dissenting opinions of THE CHIEF JUSTICE and MR. JUSTICE POWELL.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The evidence relevant to the issue of discrimination in this case falls into three categories: First, the statistical evidence introduced by respondent in both the state and federal proceedings which shows that the 80% Mexican-American majority in Hidalgo County was not proportionately represented on the grand jury lists; second, the testimony of the state trial judge outlining the Texas grand jury selection system as it operated in this case; and third, the facts judicially noticed by the District Court with respect to the political

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[2] Indeed, Judge Reynaldo Garza in this case referred to Hidalgo County as "rapidly changing" and as experiencing "rapid growth."

*The "clearly erroneous" standard applies to the review of facts found by a district court in a habeas corpus proceeding. *Wade* v. *Mayo*, 334 U. S. 672, 683–684.

dominance and control by the Mexican-American majority in Hidalgo County.

The Court today considers it dispositive that the lack of proportional representation of Mexican-Americans on the grand jury lists in this county would not have occurred if jurors were selected from the population wholly at random. But one may agree that the disproportion did not occur by chance without agreeing that it resulted from purposeful invidious discrimination. In my view, the circumstances of this unique case fully support the District Court's finding that the statistical disparity—the basis of today's decision—is more likely to have stemmed from neutral causes than from any intent to discriminate against Mexican-Americans.[1]

A

The Court holds that a criminal defendant may demonstrate a violation of the Equal Protection Clause merely by showing that the procedure for selecting grand jurors "resulted in substantial underrepresentation of his race or of

[1] A strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone* v. *Powell*, 428 U. S. 465 (1976). In *Stone* we held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.*, at 494 (footnotes omitted). Unlike the prisoner in *Stone*, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in *Stone*, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Ibid.*

But as this issue was not addressed below and was not briefed or argued in this Court, it would be inappropriate to resolve it in this case.

the identifiable group to which he belongs." *Ante*, at 494. By so holding, the Court blurs the traditional constitutional distinctions between grand and petit juries, and misapplies the equal protection analysis mandated by our most recent decisions.

The Fifth Amendment right to a grand jury does not apply to a state prosecution. *Hurtado* v. *California*, 110 U. S. 516 (1884). A state defendant cannot complain if the State forgoes the institution of the grand jury and proceeds against him instead through prosecutorial information, as many States prefer to do. See *Gerstein* v. *Pugh*, 420 U. S. 103, 116–119 (1975). Nevertheless, if a State chooses to proceed by grand jury it must proceed within the constraints imposed by the Equal Protection Clause of the Fourteenth Amendment. Thus in a line of cases beginning with *Strauder* v. *West Virgina*, 100 U. S. 303 (1880), this Court has held that a criminal defendant is denied equal protection of the law if, as a result of *purposeful* discrimination, members of his own race are excluded from jury service. See, *e. g.*, *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629 (1972); *Carter* v. *Jury Comm'n*, 396 U. S. 320, 335–337, 339 (1970); *Cassell* v. *Texas*, 339 U. S. 282, 287 (1950); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (1945). As the Court points out, this right is applicable where purposeful discrimination results only in substantial rather than total exclusion of members of the defendant's class, see, *e. g.*, *Turner* v. *Fouche*, 396 U. S. 346 (1970).

But a state defendant has no right to a grand jury that reflects a fair cross-section of the community.[2] The right

[2] It may be that nondiscriminatory methods of selection will, over time, result in a representative grand jury. See *Carter* v. *Jury Comm'n*, 396 U. S. 320, 330 (1970). But the Fourteenth Amendment does not mandate that result. Nothing would prevent a State for example, from seeking to assure informed decisionmaking by requiring that all grand jurors be lawyers familiar with the criminal law; and if that requirement should result in substantial underrepresentation on grand juries of some segments

to a "representative" grand jury is a federal right that derives not from the requirement of equal protection but from the Fifth Amendment's explicit requirement of a grand jury. That right is similar to the right—applicable to state proceedings—to a representative petit jury under the Sixth Amendment. See *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). To the extent that the Fifth and Sixth Amendments are applicable, a defendant need only show that the jury selection procedure "systematically exclude[s] distinctive groups in the community and thereby fail[s] to be reasonably representative thereof." *Id.*, at 538. But in a state case in which the challenge is to the grand jury, only the Fourteenth Amendment applies, and the defendant has the burden of proving a violation of the Equal Protection Clause.

Proof of discriminatory intent in such a case was explicitly mandated in our recent decisions in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). In *Arlington Heights* we said:

> "Our decision last Term in *Washington* v. *Davis*, 426 U. S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' *Id.*, at 242. Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . ." *Id.*, at 264–265.

We also identified the following standards for resolving issues of discriminatory intent or purpose:

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry

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of the community in some areas of the State, the Fourteenth Amendment would not render the selection process unconstitutional.

> into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than other,' *Washington* v. *Davis, supra,* at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Guinn* v. *United States,* 238 U. S. 347 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence." *Id.,* at 266 (footnotes omitted).

The analysis is essentially the same where the alleged discrimination is in the selection of a state grand jury.[3] This is

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[3] Although *Davis* and *Arlington Heights* make clear that proof of discriminatory intent is required and that proof of impact or effect alone is not sufficient, we did recognize in *Arlington Heights* that a lesser burden may be appropriate in the context of jury selection. "Because of the nature of the jury-selection task . . . we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion.*" 429 U. S., at 266 n. 13. As one illustration, we cited *Turner* v. *Fouche,* 396 U. S. 346 (1970).

In *Turner* the statistical evidence showed that Negroes constituted 60% of the general population and 37% of those included in the grand jury list. The Court found that the disparity between those figures was not so "insubstantial" as to foreclose corrective action by a federal court. *Id.,* at 359. But the Court did not view the statistics in isolation. *Turner* was not a criminal case; it involved instead Georgia's peculiar system of appointing the county board of education. The circuit judge appointed jury commissioners, who in turn selected the grand jury. The grand jury, in turn, selected the board of education. At every layer of this system white citizens were in total control. Even though all of the students in

illustrated by the recent decision in *Alexander* v. *Louisiana*, *supra*, where we stated:

> "This Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors. The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. . . ." 405 U. S., at 630.

In *Alexander*, the evidence showed that 21% of the relevant community was Negro; the jury commission consisted of five members "all of whom were white," appointed by a white judge; the grand jury venire included 20 persons, only one of whom was a Negro (5%); and none of the 12 persons on the grand jury that indicted the defendant was Negro. *Id.*, at 627, 628. This statistical array was—as the Court noted—"striking." Yet the statistics were not found, in isolation, to constitute a prima facie case. Only after determining that the selection system "provided a clear and easy opportunity

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the county schools were Negro, every white pupil having transferred elsewhere, all of the members of the board of education were white, as were all of the members of the jury commission. The District Court had found that, until the suit was instituted, "Negroes had been systematically excluded from the grand juries through token inclusion." *Id.*, at 352. It was against this background of pervasive discrimination that the Court found that even a new grand jury list with 37% Negro representation was the product of continued, purposeful discrimination.

By contrast, in *Carter* v. *Jury Comm'n*, *supra*, at 338–339, isolated proof that for 12 years no Negro had been appointed to the jury commission of a predominantly Negro county was found insufficient, standing alone, to establish discriminatory intent.

for racial discrimination" was the Court satisfied that the burden should shift to the State. *Id.*, at 630.[4]

Considered together, *Davis*, *Arlington Heights*, and *Alexander* make clear that statistical evidence showing underrep-

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[4] The Court's reliance on the "opportunity for discrimination" noted in *Alexander*, *ante*, at 495, 497, is clearly misplaced. The Court has held repeatedly that the Texas system of selecting grand jurors by the use of jury commissioners is "fair on its face and capable of being utilized without discrimination." *Hernandez* v. *Texas*, 347 U. S. 475, 478–479 (1954); accord, *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). The "subjectivity" of the selection system cuts in favor of the State where, as here, those who control the selection process are members of the same class as the person claiming discrimination. See text, *infra*, at 515–516.

Apart from *Alexander* and *Turner*, see n. 3, *supra*, this Court has sustained claims of grand jury discrimination in two situations. Most of the cases involve total exclusion of minorities from participation on grand juries: *Reece* v. *Georgia*, 350 U. S. 85 (1955) (no Negro jurors in 18 years); *Hernandez* v. *Texas*, *supra* (no Mexican-American jurors in 25 years); *Patton* v. *Mississippi*, 332 U. S. 463 (1947) (no Negro jurors in 30 years); *Hill* v. *Texas*, 316 U. S. 400 (1942) (no Negro grand jurors in 16 years or more); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939) (no Negro grand jurors in 20 years); *Hale* v. *Kentucky*, 303 U. S. 613 (1938) (no Negro jurors); *Norris* v. *Alabama*, 294 U. S. 587 (1935) (no Negro jurors in a "long number" of years); *Rogers* v. *Alabama*, 192 U. S. 226 (1904) (no Negro jurors); *Carter* v. *Texas*, 177 U. S. 442 (1900) (no Negro jurors); *Bush* v. *Kentucky*, 107 U. S. 110 (1883) (no Negro jurors); *Neal* v. *Delaware*, 103 U. S. 370 (1881) (no Negro jurors); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880) (no Negro jurors). The remainder of the cases involve severe limitation of a minority's participation by token inclusion: *Sims* v. *Georgia*, 389 U. S. 404 (1967) (Negroes constituting 24.4% of the taxpayers limited to 4.7% of those on the grand jury list); *Jones* v. *Georgia*, 389 U. S. 24 (1967) (Negroes constituting 19.7% of the taxpayers limited to 5% of those on the jury list); *Whitus* v. *Georgia*, 385 U. S. 545 (1967) (Negroes constituting 27.1% of the taxpayers limited to 9.1% of the grand jury venire); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964) (one Negro juror in 24 years); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958) (one Negro juror in 18 years); *Cassell* v. *Texas*, 339 U. S. 282 (1950) (limitation of one Negro juror on each panel); *Smith* v. *Texas*, *supra* (five Negro grand jurors in a 7-year period).

resentation of a population group on the grand jury lists should be considered in light of "such [other] circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U. S., at 266.

B

In this case, the following critical facts are beyond dispute: the judge who appointed the jury commissioners and later presided over respondent's trial was Mexican-American; three of the five jury commissioners were Mexican-American; 10 of the 20 members of the grand jury array were Mexican-American; 5 of the 12 grand jurors who returned the indictment, including the foreman, were Mexican-American,[5] and 7 of the 12 petit jurors who returned the verdict of guilt were Mexican-American. In the year in which respondent was indicted, 52.5% of the persons on the grand jury list were Mexican-American. In addition, a majority of the elected officials in Hidalgo County were Mexican-American, as were a majority of the judges. That these positions of power and influence were so held is not surprising in a community where 80% of the population is Mexican-American. As was emphasized by District Judge Garza, the able Mexican-American jurist who presided over the habeas proceedings in the District Court, this case *is* unique. Every other jury discrimination case reaching this Court has involved a situation where the governing majority, and the resulting power over the jury selection process, was held by a white electorate and white officials.[6]

[5] The District Court noted that the number of Mexican-Americans on the grand jury might have been higher had it not been for the inability of the sheriff, a Mexican-American, to locate four of the original members of the array who were Mexican-American. 384 F. Supp. 79, 83. Under Texas law, 9 of the 12 grand jurors must concur before an indictment can be presented. Tex. Code Crim. Proc., Art. 20.19 (1966).

[6] I do not suggest, of course, that the mere fact that Mexican-Americans constitute a majority in Hidalgo County is dispositive. There are many communities in which, by virtue of historical or other reasons,

The most significant fact in this case, all but ignored in the Court's opinion, is that a majority of the jury commissioners were Mexican-American. The jury commission is the body vested by Texas law with the authority to select grand jurors. Under the Texas selection system, as noted by the Court, *ante*, at 484–485, 497, the jury commission has the opportunity to identify in advance those potential jurors who have Spanish surnames. In these circumstances, where Mexican-Americans control both the selection of jurors and the political process, rational inferences from the most basic facts in a democratic society render improbable respondent's claim of an intent to discriminate against him and other Mexican-Americans. As Judge Garza observed: "If people in charge can choose whom they want, it is unlikely they will discriminate against themselves." 384 F. Supp. 79, 90.

That individuals are more likely to discriminate in favor of, than against, those who share their own identifiable attributes is the premise that underlies the cases recognizing that the criminal defendant has a personal right under the Fourteenth Amendment not to have members of his own class excluded from jury service. Discriminatory exclusion of members of the defendant's class has been viewed as unfairly excluding persons who may be inclined to favor the defendant. See

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a majority of the population may not be able at a particular time to control or significantly influence political decisions or the way the system operates. See *Turner* v. *Fouche*, 396 U. S. 346 (1970). But no one can contend seriously that Hidalgo County is such a community. The classic situation in which a "minority group" may suffer discrimination in a community is where it is "relegated to . . . a position of political powerlessness." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973). Here the Mexican-Americans are not politically "powerless"; they *are* the majoritarian political element of the community, with demonstrated capability to elect and protect their own.

Nor do I suggest that persons in positions of power can never be shown to have discriminated against other members of the same ethnic

Strauder v. *West Virginia*, 100 U. S., at 309. Were it not for the perceived likelihood that jurors will favor defendants of their own class, there would be no reason to suppose that a jury selection process that systematically excluded persons of a certain race would be the basis of any legitimate complaint by criminal defendants of that race. Only the individuals excluded from jury service would have a personal right to complain.

In *Akins* v. *Texas*, where apparently no Negro was on the jury commission and only 1 of 16 was on the jury panel, the Court emphasized the high threshold of proof required to brand officers of the court with discriminatory intent:

> "An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot lightly be concluded that officers of the courts disregard this accepted standard of justice." 325 U. S., at 400–401.

With all respect, I am compelled to say that the Court today *has* "lightly" concluded that the grand jury commissioners of this county have disregarded not only their sworn duty but also their likely inclination to assure fairness to Mexican-Americans.[7]

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or racial group. I would hold only that respondent's statistical evidence, without more, is insufficient to prove a claim of discrimination in this case.

[7] I agree with MR. JUSTICE MARSHALL, *ante*, at 504, that stereotypes concerning identifiable classes in our society have no place in the decisions of this Court. For that reason, I consider it inappropriate to characterize the Mexican-American majority in Hidalgo County as a "minority group" and on that basis to suggest that these Mexican-Americans may have "adopt[ed] the majority's negative attitudes towards the minority." *Ante*, at 503. This type of speculation illustrates the lengths to which one must go to buttress a holding of purposeful discrimination that otherwise is based solely on a lack of proportional representation.

C

It matters little in this case whether such judicially noticeable facts as the composition of the grand jury commission are viewed as defeating respondent's prima facie case at the outset or as rebutting it after it was established by statistical evidence. The significance of the prima facie case is limited to its effect in shifting the burden of going forward to the State. Once the State has produced evidence—either by presenting proof or by calling attention to facts subject to judicial notice—the only question is whether the evidence in the record is sufficient to demonstrate deliberate and systematic discrimination in the jury selection process.

Here, respondent produced statistics showing that Mexican-Americans—while substantially represented on the grand jury lists—were not represented in numbers proportionate to their share of the total population. The State responded by presenting the testimony of the judge who appointed the grand jury commissioners. Other facts, such as the presence of Mexican-Americans in a majority of the elective positions of the county, entered the record through judicial notice. The testimony, together with the facts noted by the District Court, sufficed to satisfy the State's burden of production—even assuming that respondent's evidence was sufficient to give rise to such a burden. Accordingly, at the close of the evidence, the question for the District Court was whether respondent had demonstrated by a preponderance of the evidence that the State had "deliberately and systematically den[ied] to members of [respondent's class] the right to participate as jurors in the administration of justice." *Alexander*, 405 U. S., at 628–629. The District Court found that the judge and jury commissioners had not intentionally discriminated against Mexican-Americans. 384 F. Supp., at 90. At the very least, that finding was not clearly erroneous.[8]

[8] Nothing in this case remotely resembles the stark discrimination in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *Yick Wo* v. *Hopkins*,

The Court labels it "inexplicable" that the State introduced only the testimony of the state trial judge. *Ante*, at 498. Perhaps the State fairly may be faulted for not presenting more evidence than it did. But until today's decision one may doubt whether many lawyers, familiar with our cases, would have thought that respondent's statistics, under the circumstances of this case and prevailing in Hidalgo County, were even arguably sufficient to establish deliberate and systematic discrimination.

There is for me a sense of unreality when Justices here in Washington decide solely on the basis of inferences from statistics that the Mexican-Americans who control the levers of power in this remote border county are manipulating them to discriminate "against themselves." In contrast, the judges on the scene, the state judge who appointed the jury commissioners and presided over respondent's trial and the United States District Judge—both Mexican-Americans and familiar with the community—perceived no basis for respondent's claim of invidious discrimination.

It seems to me that the Court today, in rejecting the District Court's finding that no such discrimination took place, has erred grievously. I would reinstate the judgment of the District Court.

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118 U. S. 356 (1886). Nor do the statistics in this case approach the degree of exclusion that has characterized the cases in which we have previously found grand jury discrimination. See n. 4, *supra*. In this case, in the year in which the respondent was indicted, 52.5% of the persons on the grand jury lists were Mexican-American. *Ante*, at 487 n. 7. In its preoccupation with the disparity of representation of Mexican-Americans in the total population and on the grand jury lists, the Court loses sight of the constitutional standard. Respondent has no right to "proportional representation" of Mexican-Americans, *Carter* v. *Jury Comm'n*, 396 U. S., at 339. He has only the right "to require that the State not deliberately and systematically deny to [Mexican-Americans] the right to participate as jurors in the administration of justice." *Alexander*, 405 U. S., at 628–629.

Syllabus

JONES, DIRECTOR, DEPARTMENT OF WEIGHTS AND MEASURES, RIVERSIDE COUNTY *v.* RATH PACKING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-1053. Argued December 6-7, 1976—Decided March 29, 1977*

Section 12211 of the California Business and Professions Code provides that "the average weight or measure of the packages or containers in a lot of any . . . commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package." Article 5, § 2930 *et seq.*, of Title 4 of the California Administrative Code in implementing § 12211 requires a statistical sampling process for determining the average net weight of a lot, which implicitly allows for variations from stated weight caused by unavoidable deviations in the manufacturing process but makes no allowance for loss of weight resulting from moisture loss during the course of good distribution practice. Petitioner county Director of Weights and Measures, pursuant to § 12211, ordered removed from sale bacon packaged by respondent packing company and flour packaged by respondent millers after he had determined under Art. 5 that the packages were contained in lots whose average net weights were less than the net weights stated on the packages. Respondent packing company's bacon is also subject to inspection under the Federal Meat Inspection Act (FMIA), as amended by the Wholesome Meat Act, which requires a meat or a meat product package to bear a label showing, *inter alia*, an accurate statement of the quantity of the contents in terms of weight, but permits "reasonable variations"; and implementing regulations permit "reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviation in good manufacturing practice." The FMIA prohibits labeling or packaging requirements "different than" those imposed under that statute. The federal law governing net-weight labeling of respondent millers' flour is contained in

*Together with *Jones, Director, Department of Weights and Measures, Riverside County* v. *General Mills, Inc., et al.*, also on certiorari to the same court (see this Court's Rule 23 (5)).

the Federal Food, Drug, and Cosmetic Act (FDCA) and the Fair Packaging and Labeling Act (FPLA), which impose the same federal weight labeling standard for flour as the FMIA imposes for meat. The FDCA and implementing regulations permit the same kind of reasonable variations from the packaging requirements as does the FMIA and its implementing regulations. The FDCA contains no pre-emptive language but the FPLA in 15 U. S. C. § 1461 provides that the Act supersedes any state laws that are "less stringent than or require information different from" the requirements of the FPLA or its implementing regulations. Respondents brought suits in Federal District Court, seeking declarations that § 12211 and Art. 5 were pre-empted by the federal laws and injunctions against enforcement of those provisions. The District Court granted the requested relief, and the Court of Appeals affirmed. *Held:*

1. With respect to respondent packing company's packaged bacon, § 12211 and Art. 5 are pre-empted by the FMIA. Since California makes no allowance for loss of weight resulting from moisture loss during the course of good distribution practice the state law's requirement—that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing variations—is "different than" the federal requirement, which permits manufacturing deviations *and* variations caused by moisture loss during good distribution practice. Pp. 528–532.

2. Although 15 U. S. C. § 1461 does not pre-empt § 12211 as implemented by Art. 5, since it appears that the California law is not "less stringent than" and does not "require information different from" the FPLA and implementing regulations, nevertheless, with regard to respondent millers' flour, enforcement of § 12211, as implemented by Art. 5, would prevent "the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67, in passing the FPLA, an impermissible result under the Constitution, and hence the state law must yield to the federal. The goal of the FPLA to facilitate value comparisons among similar products cannot be accomplished unless packages that bear the same indicated weight in fact contain the same quantity of the product for which the consumer is paying. Here packages of flour that meet the federal labeling requirements and that have the same stated quantity of contents can be expected to contain the same amount of flour solids, since variations from stated weight caused by loss of moisture are permitted, whereas as a result of the application of the California standard, which does not permit such variations, consumers who attempt to compare the value of identically labeled packages of flour would not be comparing packages

that contain identical amounts of flour solids and hence would be misled. Pp. 532–543.

530 F. 2d 1295 and 530 F. 2d 1317, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which STEWART, J., joined, *post*, p. 543.

Loyal E. Keir argued the cause for petitioner. With him on the briefs was *Ray T. Sullivan, Jr.*

Dean C. Dunlavey argued the cause and filed a brief for respondents.

Allan J. Goodman, Deputy Attorney General of California, argued the cause for 39 States et al. as *amici curiae* urging reversal. With him on the brief were *Evelle J. Younger*, Attorney General, *Carl Boronkay*, Assistant Attorney General, and *Herschel T. Elkins*, Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *William J. Baxley* of Alabama, *Avrum Gross* of Alaska, *Bruce E. Babbitt* of Arizona, *Jim Guy Tucker* of Arkansas, *J. D. MacFarlane* of Colorado, *Richard R. Wier, Jr.*, of Delaware, *Robert L. Shevin* of Florida, *Arthur K. Bolton* of Georgia, *Ronald Y. Amemiya* of Hawaii, *Wayne L. Kidwell* of Idaho, *William J. Scott* of Illinois, *Curt T. Schneider* of Kansas, *Robert F. Stephens* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Joseph E. Brennan* of Maine, *Francis B. Burch* of Maryland, *Francis X. Bellotti* of Massachusetts, *Frank J. Kelly* of Michigan, *A. F. Summer* of Mississippi, *John C. Danforth* of Missouri, *Robert L. Woodahl* of Montana, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *David H. Souter* of New Hampshire, *Toney Anaya* of New Mexico, *Rufus L. Edmisten* of North Carolina, *Allen I. Olson* of North Dakota, *William J. Brown* of Ohio, *Larry Derryberry* of Oklahoma, *Lee Johnson* of Oregon, *Daniel R. McLeod* of South Carolina, *William J. Janklow* of South Dakota, *John L. Hill* of Texas, *Vernon B. Romney* of Utah, *Andrew P. Miller* of Virginia, *Slade*

Gorton of Washington, *Chauncey H. Browning, Jr.*, of West Virginia, and *V. Frank Mendicino* of Wyoming.†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner Jones is Director of the Department of Weights and Measures in Riverside County, Cal.[1] In that capacity he ordered removed from sale bacon packaged by respondent Rath Packing Co. and flour packaged by three millers, respondents General Mills, Inc., Pillsbury Co., and Seaboard Allied Milling Corp. (hereafter millers). Jones acted after determining, by means of procedures set forth in 4 Cal. Admin. Code c. 8, Art. 5, that the packages were contained in lots[2] whose average net weight was less than the net weight stated on the packages. The removal orders were authorized by Cal. Bus. & Prof. Code § 12211 (West Supp. 1977).[3]

†*Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg* and *Paul S. Shemin*, Assistant Attorneys General, filed a brief for the State of New York as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork, Assistant Attorney General Lee*, and *Mark L. Evans* for the United States; by *H. Templeton Brown, Robert L. Stern*, and *William A. Gordon* for the American Meat Institute; by *Jonathan W. Sloat* for the Grocery Manufacturers of America, Inc.; and by *Edwin H. Pewett* and *James M. Kefauver* for the National Independent Meat Packers Assn. et al.

[1] The title "county director of weights and measures" is a statutory alternative to the title "county sealer." Cal. Bus. & Prof. Code § 12006 (West 1964). The office of county sealer is established and its duties prescribed by §§ 12200–12214 (West 1964 and Supp. 1977).

[2] " 'Lot' means the total number of packages of a single item of merchandise in a single size at one location and may contain two or more 'sub-lots.'

" 'One location' shall be construed to mean 'one display' or 'one grouping,' and does not, for example, mean all items of the same brand and size stored or kept for sale in one establishment." 4 Cal. Admin. Code § 2931.3 (1970).

[3] "Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in

Rath and the millers responded by filing suits in the District Court for the Central District of California.[4] They sought both declarations that § 12211 and Art. 5 are pre-

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order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

"The director [of agriculture] is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers in connection with the weighing or measuring of amounts of commodities in individual packages or containers or lots of such packages or containers, including the procedures for sampling any such lot, and in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section. . . .

"Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4.5 (commencing with Section 11371), of Part 1 of Division 3 of Title 2 of the Government Code; provided, that the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package, and provided further, that said rules or regulations applicable to food, as defined in Section 26450 of the Health and Safety Code, insofar as possible, shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act.

"Any lot or package of any such commodity which conforms to the provisions of this section shall be deemed to be in conformity with the provisions of this division relating to stated net weights or measures.

"Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented."

[4] Rath filed separate actions against Jones and M. H. Becker, Director of the County Department of Weights and Measures of Los Angeles County. The two actions were consolidated for decision in the District

empted by federal laws regulating net-weight labeling and injunctions prohibiting Jones from enforcing those provisions. The District Court granted the requested relief [5] and, insofar as is relevant here, the Court of Appeals affirmed.[6] We granted Jones' petition for certiorari, 425 U. S. 933 (1976),[7] and now affirm the judgments of the Court of Appeals.

I

In its present posture, this litigation contains no claim that the Constitution alone denies California power to enact

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Court after trial of the action against Becker and argument of cross-motions for summary judgment in the suit against Jones. *Rath Packing Co.* v. *Becker*, 357 F. Supp. 529, 531 (CD Cal. 1973). The Director of Food and Agriculture of the State of California intervened as a defendant in the *Becker* proceeding. The millers filed a single action against Jones.

[5] The District Court's opinion in Rath's suit is reported as *Rath Packing Co.* v. *Becker*, *supra*. The decision in the millers' action is not separately reported, but is reprinted as an appendix to the Court of Appeals' opinion. *General Mills, Inc.* v. *Jones*, 530 F. 2d 1317, 1329–1330 (CA9 1975).

Rath's argument that 21 U. S. C. § 607 (b) limits enforcement of the accuracy requirement to the time meat or meat food products leave the processing plant was rejected by the District Court, 357 F. Supp., at 532, as were the millers' contentions that California's inspection laws unreasonably burden interstate commerce and deny manufacturers due process of law. See *General Mills, Inc.* v. *Jones*, *supra*, *at* 1322–1323.

[6] *Rath Packing Co.* v. *Becker*, 530 F. 2d 1295 (CA9 1975); *General Mills, Inc.* v. *Jones*, *supra*.

The Court of Appeals reversed the District Court's holding that the governing federal regulations, 9 CFR § 317.2 (h) (2) (1976) and 21 CFR § 1.8b (q) (1976), are void for vagueness. *Rath Packing Co.* v. *Becker*, *supra*, at 1308–1312; *General Mills, Inc.* v. *Jones*, *supra*, at 1323–1324. The validity of the regulations is not at issue here.

[7] Jones' single petition for certiorari sought review of the judgments in both *Rath Packing Co.* v. *Becker*, *supra*, and *General Mills, Inc.* v. *Jones*, *supra*. See this Court's Rule 23 (5). No action has been taken on the separate petition for certiorari filed by California's Director of Food and Agriculture, see n. 4, *supra*, and Becker. *Wallace* v. *Rath Packing Co.*, cert. pending, No. 75–1052.

the challenged provisions.[8] We are required to decide only whether the federal laws which govern respondents' packing operations preclude California from enforcing § 12211, as implemented by Art. 5.

Our prior decisions have clearly laid out the path we must follow to answer this question. The first inquiry is whether Congress, pursuant to its power to regulate commerce, U. S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e. g.*, U. S. Const., Art. I, § 10; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 358 (1898), "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). This assumption provides assurance that "the federal-state balance," *United States* v. *Bass*, 404 U. S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624, 633 (1973); *Rice* v. *Santa Fe Elevator Corp.*, *supra*, at 230.

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws

[8] The Court of Appeals affirmed the District Court's holding, see n. 5, *supra*, that the California provisions violate neither the Commerce Clause nor the Fourteenth Amendment. 530 F. 2d, at 1322–1323. The millers do not challenge these holdings here.

with which they conflict. U. S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). Accord, *De Canas* v. *Bica*, 424 U. S. 351, 363 (1976); *Perez* v. *Campbell*, 402 U. S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, *supra*, at 141; *id.*, at 165 (WHITE, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *De Canas* v. *Bica*, *supra*, at 363–365; *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U. S. 111 (1965), aff'd on further consideration, 364 F. 2d 241 (CA2 1966), cert. denied, 385 U. S. 1036 (1967).

II

Section 12211 of the Cal. Bus. & Prof. Code (West Supp. 1977) applies to both Rath's bacon and the millers' flour. The standard it establishes is straightforward: "[T]he average weight or measure of the packages or containers in a lot of any . . . commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package."

In order to determine whether that standard has been violated, local officials such as Jones follow the statistical sampling procedure set forth in Art. 5.[9] That procedure requires the inspector to identify a lot of identical packages of a commodity and determine the number of packages in that lot.

[9] The District Court concluded that the Art. 5 "procedure is a statistical determination based upon normal and proven statistical standards." 357 F. Supp., at 533. The statistical validity of the procedure has not been challenged.

He then determines, from tables in the regulation, the number of packages necessary to provide a suitable sample of the lot, and a smaller number of packages which is used to determine the average tare.[10] After determining that average, the inspector weighs each package in the sample, subtracts the average tare, and records the difference between the measured and the stated net weights. These measurements are used to identify individual packages in the sample which deviate unreasonably from the stated weight. Those packages are replaced[11] in the sample and the replacements weighed.

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[10] "Tare" is the weight of the packing material in which the product is contained. In order to determine the tare, the inspector weighs each package and then removes and weighs the contents of each package. By subtracting the net weight from the gross weight, he obtains the tare.

After it is packed, bacon loses moisture. Some of that moisture is absorbed by the insert on which the bacon is placed. A wax board insert will absorb approximately 5/16 of an ounce from the product, whereas a polyethylene insert will absorb approximately 1/16 of an ounce. App. 88–90, 94; 530 F. 2d, at 1299 n. 2. In addition, moisture is lost to the atmosphere or, in a hermetically sealed package, by condensation onto the packing material. App. 61. California's inspectors include in the weight of the material any moisture or grease which the bacon has lost to it. Federal inspectors at the packing plant, by contrast, determine the tare by weighing the packing material dry. 530 F. 2d, at 1299. It is not feasible for field inspectors to use a dry tare method. C. Brickenhamp, S. Hasko, & M. Natrella, Checking Prepackaged Commodities—Revision of National Bureau of Standards Handbook 67, p. 33 (July 1975 Draft).

After noting this difference, the Court of Appeals stated: "The difference in tares employed is not an issue in this case." 530 F. 2d, at 1299 n. 4. Respondents have, nevertheless, suggested that the divergence in results produced by the two techniques requires federal pre-emption, Brief for Respondents 18–19, 37; Tr. of Oral Arg. 43–44. We consider the difference significant only insofar as it is an aspect of the State's failure to allow variations from stated weight resulting from loss of moisture during good distribution practice. See *infra*, at 531–532.

[11] "The individual unreasonable errors, both plus and minus, are excluded from the average, because they are acted upon individually and because their inclusion could destroy or alter the packaging pattern. For instance: A sample of ten (10) packages could show nine (9) packages

Finally, the deviations from the stated weight are totaled algebraically and compared with tables which indicate the magnitude of the total error necessary to conclude that the lot's average weight is or is not less than the stated weight.[12]

III

A. Rath's bacon is produced at plants subject to federal inspection under the Federal Meat Inspection Act (FMIA or Act), as amended by the Wholesome Meat Act, 81 Stat. 584, 21 U. S. C. § 601 *et seq.* Among the requirements imposed on federally inspected plants, and enforced by Department of Agriculture inspectors,[13] are standards of accuracy in labeling. On the record before us, we may assume that Rath's bacon complies with these standards.[14]

The federal labeling requirement is imposed by § 7 (b) of the FMIA, 81 Stat. 588, 21 U. S. C. § 607 (b), which commands:

"All . . . meat and meat food products inspected at any

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each with a minus error of 1, and one package with a plus error of 9. If the large plus error is included, the total error is 0. Obviously, the pattern of the sample is a minus 1 per package." 4 Cal. Admin. Code § 2933.3.11 (1961).

Enforcement action is taken against packages with unreasonably large minus errors. § 2933.3.12 (c) (1970).

[12] If the result of the sampling is not conclusive, additional samples may be drawn. §§ 2933.3.12 (a), (b) (1961).

[13] Rath's procedures for assuring that its bacon packages contain the stated net weight have been submitted to the Department of Agriculture for approval. 530 F. 2d, at 1298; Brief for Respondents 9. When an approved plan is in effect, the federal inspector reviews records and observes procedures to assure compliance with the plan. The inspector is also required to sample one subgroup at least twice a week and to check the weight of a production lot at least once a week. U. S. Department of Agriculture, Meat and Poultry Inspection Manual § 18.61 (b) (1) (i) (1973). When no approved plan is in effect, the inspector samples at least 10 lots each week, unless production volume is low. *Id.*, at 18.61 (b) (2).

[14] See 530 F. 2d, at 1299.

> establishment under the authority of this title . . . shall at the time they leave the establishment bear . . . the information required under paragraph (n) of section 1 of this Act."

Section 1 (n) of the FMIA, 21 U. S. C. § 601 (n), defines the term "misbranded." As relevant here, it provides that meat or a meat product is misbranded

> "(5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That . . . reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary." 81 Stat. 586.

Other sections of the FMIA prohibit dealing in misbranded products, as defined by § 1 (n).[15]

The Secretary of Agriculture has used his discretionary authority to permit "reasonable variations" in the accuracy of the required statement of quantity:

> "The statement [of net quantity of contents] as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 9 CFR § 317.2 (h)(2) (1976).

Thus, the FMIA, as implemented by statutorily authorized regulations, requires the label of a meat product accurately to indicate the net weight of the contents unless the difference

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[15] 21 U. S. C. §§ 607 (d), 610 (b).

between stated and actual weights is reasonable and results from the specified causes.[16]

B. Section 408 of the FMIA, 21 U. S. C. § 678, prohibits the imposition of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" the Act.[17] This explicit pre-emption provision

[16] Both sources of variation from stated weight are relevant to bacon. Bacon loses moisture to its wrapping materials and to the atmosphere. See n. 10, *supra*. The rate of loss to the atmosphere in a typical retail showcase is 0-3/16 to 0-4/16 of an ounce per day. App. 95. In addition, since bacon is cut in discrete slices, it is impossible to guarantee that each package will contain exactly the stated weight when packed. Instead of seeking exactitude, Rath approved packages if they were within 5/16 of an ounce of a target weight. Prior to petitioner's enforcement activities, and the similar activities of Becker, see n. 4, *supra*, Rath's target weight was 3/16 of an ounce over the stated weight, or 1 lb. 3/16 oz. for a one-pound package. Thus, a package would be passed if it weighed between 15 1/16 oz. and 1 lb. 5/16 oz. In response to the California enforcement measures, Rath raised its target weight to 5/16 oz. over stated net weight for bacon packed on a polyethylene insert, and 12/16 oz. over stated weight for bacon packed on wax boards. App. 86–89.

[17] Section 408, 81 Stat. 600, states in full:

"Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act, which are in addition to, or different than those made under this Act may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 202 of this Act if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act, but any State or Territory or the District of Columbia may, consistent with the requirements under this Act, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said title, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry

dictates the result in the controversy between Jones and Rath. California's use of a statistical sampling process to determine the average net weight of a lot implicitly allows for variations from stated weight caused by unavoidable deviations in the manufacturing process.[18] But California makes no allowance for loss of weight resulting from moisture loss during the course of good distribution practice.[19] Thus, the state

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into the United States. This Act shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this Act, with respect to any other matters regulated under this Act."

[18] The implicit recognition of manufacturing variations results from California's use of the statistically estimated average weight of the lot to determine whether the label accurately indicates the contents. By averaging the weight of the packages in the sample, California allows individual deviations around the packer's target weight to cancel each other out. The average weight of the sample should equal the target weight, see n. 16, *supra*, with allowance for sampling variation and moisture loss. Article 5 utilizes tables which recognize sampling variation, but it makes no allowance for moisture loss.

The Department of Agriculture itself uses statistical sampling techniques, including reliance on average lot weight to account for manufacturing deviations. See Meat and Poultry Inspection Manual, *supra*, n. 13, at § 18.61 (b)(2); Brief for United States as *Amicus Curiae* 7 n. 4. Indeed, it is difficult to imagine any other practical technique for policing net-weight labeling requirements in a country where over 200 billion packages are produced every year. See Brickenhamp, Hasko, & Natrella, *supra*, n. 10, at 78. We have found no indication that Congress intended simultaneously to grant concurrent jurisdiction to the States to enforce net-weight labeling requirements, see n. 17, *supra*, and to deny them the only practical tool with which to do so. Accordingly, we disagree with anything in the opinions below that suggests that States may not use valid statistical sampling techniques, including reliance on lot average weights, to police compliance with federal and valid state net-weight labeling laws.

[19] Moisture loss during distribution will, obviously, cause the net weight of bacon to be less than it was when the bacon left the packing plant. An averaging procedure, in which deviations above the average cancel deviations below the average, does not make any allowance for moisture loss during good distribution practice, which works in only one direction.

law's requirement—that the label accurately state the net weight, with implicit allowance only for reasonable manufacturing variations—is "different than" the federal requirement, which permits manufacturing deviations *and* variations caused by moisture loss during good distribution practice.

Petitioner Jones seeks to avoid this result by arguing that the FMIA's provisions governing the accuracy of the required net-quantity statements are not "labeling requirements" within the meaning of § 408. He contends that "labeling" refers only to the format and placement of information, not to its content.[20] Requirements relating to accuracy, according to Jones, deal with the problem of misbranding, and § 408 grants the States concurrent jurisdiction over that subject.

We agree with the Court of Appeals that this argument is "strained." 530 F. 2d, at 1314 n. 25. Nothing in the Act suggests the restrictive meaning petitioner ascribes to the phrase "labeling requirements." To the contrary, § 7 (b) requires that the product bear specified information, see *supra*, at 528–529, and § 1 (p) of the FMIA, 21 U. S. C. § 601 (p),[21] makes clear that any material bearing that information is part of the product's labeling. It twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a "labeling requirement."

We therefore conclude that with respect to Rath's packaged bacon, § 12211 and Art. 5 are pre-empted by federal law.

IV

A. The federal law governing net-weight labeling of the millers' flour is contained in two statutes, the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended,

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[20] Brief for Petitioner 40. See also Brief for 39 States as *Amici Curiae* 56–58.

[21] "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." § 1 (p), 81 Stat. 587.

21 U. S. C. § 301 *et seq.*, and the Fair Packaging and Labeling Act (FPLA), 80 Stat. 1296, as amended, 15 U. S. C. §§ 1451–1461. For the reasons stated below, we conclude that the federal weight-labeling standard for flour is the same as that for meat.

The FDCA prohibits the introduction or delivery for introduction into interstate commerce of any food [22] that is misbranded. 21 U. S. C. § 331. A food is misbranded under the FDCA,

> "[i]f in package form unless it bears a label containing . . . an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That . . . reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary." § 343 (e).

This provision is identical to the parallel provision in the FMIA, see *supra*, at 529, except that the FDCA mandates rather than allows the promulgation of implementing regulations.[23] The regulation issued in response to this statutory mandate is also substantially identical to its counterpart under the FMIA:

> "The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 21 CFR § 1.8b (q) (1976).

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[22] Flour is a food within the coverage of the Act. See 21 U. S. C. § 321 (f).

[23] The definition of "misbranded" in the FMIA is based on the definition in the FDCA. See S. Rep. No. 799, 90th Cong., 1st Sess., 7 (1967).

Since flour is a food under the FDCA, its manufacture is also subject to the provisions of the FPLA. See 15 U. S. C. §§ 1452, 1459 (a). That statute states a congressional policy that "[p]ackages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons." § 1451. To accomplish those goals, insofar as is relevant here, the FPLA bans the distribution in commerce of any packaged commodity unless it complies with regulations

"which shall provide that—

. . . . .

"(2) The net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of [the required] label." § 1453 (a).

The FPLA also contains a saving clause which specifies that nothing in the FPLA "shall be construed to repeal, invalidate, or supersede" the FDCA. § 1460. Nothing in the FPLA explicitly permits any variation between stated weight and actual weight.

The *amici* States contend that since the FPLA does not allow any variations from stated weight, there is no difference between federal law governing labeling of flour and California law. The Court of Appeals, however, held that because of the saving clause, compliance with the FDCA, which does allow reasonable variations, satisfies the requirements of the FPLA. 530 F. 2d, at 1325. *Amici* respond that the Court of Appeals misinterpreted the FDCA and that the FDCA establishes a statutory standard of strict accuracy for net-weight labeling. They argue, therefore, that the saving clause of the FPLA does not alter the standard mandated by § 1453. Brief for 39 States as *Amici Curiae* 15–21. Alternatively, the States argue that although the saving clause means that the FPLA does not supersede the FDCA, "it

cannot be construed to excuse compliance with FPLA standards where both FDCA and FPLA requirements are applicable." *Id.*, at 28.

The States' argument that the FDCA standard makes no allowance for reasonable variations is based on this Court's opinion in *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932). *Shreveport* decided an appeal by the Government in a criminal case involving shortweighting in violation of the predecessor of the FDCA, the Food and Drugs Act, 34 Stat. 768, as amended, c. 117, 37 Stat. 732. The trial court had dismissed the indictment under that statute, which was essentially identical to the net-weight labeling requirement of the FDCA,[24] on the ground that the prohibition of unreasonable variations from the marked weight was too indefinite to state a criminal offense. We reversed, holding that the statute's substantive standard was created by the "accurate statement" language which preceded the proviso allowing reasonable variations, and that the proviso merely granted administrative authority to promulgate regulations permitting variations "from the hard and fast rule of the act." 287 U. S., at 81–82. Since Congress re-enacted the language interpreted by the *Shreveport* Court, FDCA, c. 675, § 403 (e), 52 Stat. 1047, *amici* conclude that the standard under the FDCA is also a "hard and fast rule."

We need not decide whether the rationale as well as the

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[24] The statute construed in *Shreveport* provided that a food would be considered misbranded—

"If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act." 287 U. S., at 81.

result of *Shreveport* remains good law.[25] It is clear that 21 CFR § 1.8b (q) (1976), insofar as it is based on the FDCA, has the force of law[26] and allows reasonable variations. Thus, whether the statutory standard is viewed as strict, with the regulation considered a restriction on the power to prosecute, or whether the standard is itself viewed as incorporating the flexibility of the proviso and its implementing regulation,[27] the result is the same. Under the FDCA, reasonable variations from the stated net weight do not subject a miller to prosecution, whether civil or criminal, if the variations arise from the permitted causes. The question raised by the arguments of *amici* is whether by enacting the FPLA, Congress intended to eliminate the area of freedom from prosecution created by the FDCA and its implementing regulation.

Over 60 years ago, Congress concluded that variations must be allowed because of the nature of certain foods and the impossibility of developing completely accurate means of packing. H. R. Rep. No. 850, 62d Cong., 2d Sess., 2

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[25] We have subsequently cited *Shreveport* as an example of a case where a criminal statute has been found not impermissibly vague although it did not provide an unmistakably clear line between prohibited and permitted conduct. *Jordan* v. *De George*, 341 U. S. 223, 231 n. 15 (1951); *Gorin* v. *United States*, 312 U. S. 19, 27 n. 13 (1941).

[26] *United States* v. *Mersky*, 361 U. S. 431, 437–438 (1960); *Atchison, T. & S. F. R. Co.* v. *Scarlett*, 300 U. S. 471, 474 (1937).

[27] This view, although contrary to the Court's analysis in *Shreveport*, is strongly supported by the legislative history of the statutory provision for reasonable variations. As originally passed, the Food and Drugs Act did not require packages to bear a statement of net weight, but it did require that any statement of weight be plain and correct. § 8, 34 Stat. 771. In 1913 Congress changed the law by requiring that labels state the quantity of contents, and at the same time it added the recognition of reasonable variations. C. 117, 37 Stat. 732. Both the House and Senate committee reports stated that "[u]nder the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations . . . ." H. R. Rep. No. 850, 62d Cong., 2d Sess., 3 (1912); S. Rep. No. 1216, 62d Cong., 3d Sess., 3 (1913).

(1912); S. Rep. No. 1216, 62d Cong., 3d Sess., 2–3 (1913).[28] Since 1914, regulations under the food and drug laws have permitted reasonable variations from stated net weight resulting from packing deviations or gain or loss of moisture occurring despite good commercial practice. See *United States* v. *Shreveport Grain & Elevator Co., supra,* at 84. If Congress had intended to overrule this longstanding administrative practice, founded on a legislative statement of necessity, we would expect it to have done so clearly. Instead, it explicitly preserved existing law, with "no changes." 15 U. S. C. § 1460; S. Rep. No. 1186, 89th Cong., 2d Sess., 20 (1966). The legislative history of the FPLA contains some indication that the saving clause was understood to preserve the reasonable-variation regulation under the FDCA,[29] and no evidence that Congress affirmatively intended to overrule that regulation.[30] We can only conclude that under the FPLA, as under the FDCA, a manufacturer of food is not

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[28] The language of the two committee reports is identical:

"It being apparent to everyone that it is impossible to make packages of exactly the same size or to pack them with exactly the same quantity of contents, and it being also apparent that the exact weight and measure of the contents of a package may undergo slight changes from natural causes, it is also apparent that legislation requiring similar packages to contain the same exact quantity in terms of weight or measure, without allowing for any variation, would be destructive and prevent the putting of foods in packages." H. R. Rep. No. 850, *supra,* at 2; S. Rep. No. 1216, *supra,* at 2–3.

[29] See Hearings on Fair Packaging and Labeling before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess., 208 (1966).

[30] It is clear from reading the legislative history that Congress did not intend to alter the FDCA's standard of accuracy when it passed the FPLA's requirement that a separate and accurate statement of net quantity appear in a uniform location on package labels, 15 U. S. C. § 1453 (a)(2). See, *e. g.,* H. R. Rep. No. 2076, 89th Cong., 2d Sess., 20 (1966) (chart indicating that only change from FDCA effected by provision which became § 1453 is imposition of location requirement).

subject to enforcement action for violation of the net-weight labeling requirements if the label accurately states the net weight, with allowance for the specified reasonable variations.

B. The FDCA contains no pre-emptive language. The FPLA, on the other hand, declares that

> "it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net qua[nt]ity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." 15 U. S. C. § 1461.[31]

The Court of Appeals, although recognizing that this section leaves more scope for state law than does the FMIA, concluded that § 12211, as implemented by Art. 5, is pre-empted because it is less stringent than the Federal Acts, 530 F. 2d, at 1324–1327.

The basis for the Court of Appeals' holding is unclear. Its opinion may be read as based on the conclusion that the state law is inadequate because its enforcement relies on a statistical averaging procedure. We have rejected that conclusion. See *supra*, at 531, and n. 18. Alternatively, the Court of Appeals may have found California's approach less stringent because the State takes no enforcement action against lots whose

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[31] Since we have held that 15 U. S. C. § 1453, read in conjunction with § 1460 and the FDCA, permits reasonable variations, we conclude that 21 CFR § 1.8b (q) (1976) properly relies on § 1453 as authority for its promulgation. Thus, § 1461 pre-empts state laws which "are less stringent than or require information different from" § 1.8b (q). We need not consider respondents' contention, Brief for Respondents 30, that § 1.8b (q) is authorized by 15 U. S. C. § 1454 (b), nor need we decide whether § 1461 would affect state laws less stringent than or different from regulations authorized by § 1454.

average net weight *exceeds* the weight stated on the label, even if that excess is not a reasonable variation attributable to a federally allowed cause.

We have some doubt that by pre-empting less stringent state laws, Congress intended to compel the States to expend scarce enforcement resources to prevent the sale of packages which contain more than the stated net weight. We do not have to reach that question, however, because in this respect California law apparently differs not at all from federal law, as applied. The inspectors responsible for enforcing the net-weight labeling provisions of the Federal Acts are officially informed that "[f]ield weighing for net weight is primarily to determine the likelihood of short weight units in the lots." Moreover, they are not required to submit samples to headquarters "if the average net is not below the amount declared on the label." Food and Drug Administration, Inspection Operations Manual 448.1, 448.13 (1976). These instructions undercut the argument that there is a federal interest in preventing packages from being overfilled.[32] Since neither jurisdiction is concerned with overweighting in the administration of its weights and measures laws, we cannot say that California's statutory lack of concern for that "problem" [33] makes its laws less stringent than the federal.

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[32] Overweight packages are apparently also of no concern in the administration of the FMIA. See Meat and Poultry Inspection Manual, *supra*, n. 13, at 168–174. At oral argument, counsel for respondents was unable to cite any examples of federal enforcement action against overweight packages. See Tr. of Oral Arg. 49–50. To support his argument that federal law forbids overweighting, counsel relied on the argument made by the United States as *amicus curiae* in this litigation. The Government's brief in this Court also cites no examples of enforcement action based on overweighting and, although it refers generally to the inspection manuals cited here and in text, the brief makes no mention of the provisions to which we refer.

[33] The economic self-interest of packers is likely to prevent avoidable overpacking.

Respondents argue that California's law is pre-empted because it requires information different from that required by federal law. The meaning of the statutory pre-emption of laws that require "information different from" the federal net-weight labeling provisions, like the meaning of the phrase "less stringent," is unclear. Respondents attribute to the ban on requiring different information a broad meaning, similar in scope to the pre-emption provision of the FMIA. They contend that since California law requires the label to state the minimum net weight, it requires "information different from" the federal laws, which demand an accurate statement with allowance for the specified reasonable variations. Brief for Respondents 31–32. The legislative history, however, suggests that the statute expressly pre-empts as requiring "different information" only state laws governing net quantity labeling which impose requirements inconsistent with those imposed by federal law.[34] Since it would be possible to comply with the state law without triggering federal enforcement action we conclude that the state requirement is not inconsistent with federal law. We therefore hold that 15 U. S. C. § 1461 does not pre-empt California's § 12211 as implemented by Art. 5.

That holding does not, however, resolve this case, for we still must determine whether the state law "stands as an obstacle to the accomplishment and execution of the full

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[34] The language of 15 U. S. C. § 1461 was contained in the House bill. The Senate bill, by contrast, provided for pre-emption of state requirements which "differ from" those in the FPLA. S. Rep. No. 1186, 89th Cong., 2d Sess., 38 (1966). The language accepted by the House was adopted by the conference committee, along with the House committee's explanation that

"preemption would take place to the extent that 'State laws or State regulations with respect to the labeling of net quantity of contents of packages impose inconsistent or less stringent requirements than are imposed under section 4 of this legislation.'" H. R. Rep. No. 2286, 89th Cong., 2d Sess., 11 (1966).

purposes and objectives of Congress." See *supra*, at 526. As Congress clearly stated, a major purpose of the FPLA is to facilitate value comparisons among similar products. Obviously, this goal cannot be accomplished unless packages that bear the same indicated weight in fact contain the same quantity of the product for which the consumer is paying. The significance of this requirement for our purposes results from the physical attributes of flour.

Flour is composed of flour solids and moisture. The average water content of wheat kernels used to make flour is 12.5% by weight, with a range from 10% to 14.5%. Efficient milling practice requires adding water to raise the moisture content to 15% to 16%; if the wheat is too wet or too dry, milling will be hindered. During milling, the moisture content is reduced to 13% to 14%. App. 28–29.[35]

The moisture content of flour does not remain constant after milling is completed. If the relative humidity of the atmosphere in which it is stored is greater than 60%, flour will gain moisture, and if the humidity is less than 60%, it will lose moisture.[36] The federal net-weight labeling standard permits variations from stated weight caused by this gain or loss of moisture.

Packages that meet the federal labeling requirements[37]

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[35] The maximum allowable moisture content for any product labeled "flour" is 15%. 21 CFR § 15.1 (1976).

[36] App. 32–35. Weight fluctuations of 3% to 4% resulting from changes in moisture content are not uncommon during good distribution practice within the continental United States. *Id.*, at 32–33. The flour produced by respondent General Mills and ordered off the market by petitioner weighed, on the average, between 0.125% and 1.25% less than the stated weights. *Id.*, at 36.

If flour were packed in airtight packages in order to prevent weight fluctuations resulting from changes in moisture content, it would spoil. Tr. of Oral Arg. 39.

[37] It is undisputed that the packages of flour ordered off the market by petitioner complied with federal standards when packed. 530 F. 2d, at 1320; App. 36–37.

and that have the same stated quantity of contents can be expected to contain the same amount of flour solids.[38] Manufacturers will produce flour with a moisture content fixed by the requirements of the milling process.[39] Since manufacturers have reason not to pack significantly more than is required and federal law prohibits underpacking, they will pack the same amount of this similarly composed flour into packages of any given size.[40] Despite any changes in weight resulting from changes in moisture content during distribution, the packages will contain the same amount of flour solids when they reach the consumer. This identity of contents facilitates consumer value comparisons.

The State's refusal to permit reasonable weight variations resulting from loss of moisture during distribution produces a different effect.[41] In order to be certain of meeting the California standard, a miller must ensure that loss of moisture during distribution will not bring the weight of the contents below the stated weight. Local millers, which serve a limited area, could do so by adjusting their packing practices to the specific humidity conditions of their region. For example, a miller in an area where the humidity is typically higher than

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[38] The nutritional value of a quantity of flour is determined by the amount of flour solids it contains. *Id.*, at 35.

[39] Although federal law would allow moisture content to be higher than that required by the milling process, see n. 35, *supra*, flour of the type involved in this case is not produced with moisture content as high as the law would permit. App. 30. Since manufacturers would have an economic incentive to produce flour with as close to the allowable maximum moisture content as milling technique permits, one would expect all flour to have virtually the same moisture content when packed.

[40] Unavoidable deviations resulting from the packing process will, of course, cause differences in the contents of individual packages. On the average, however, one would expect packages of a given size to contain the same amount.

[41] Since neither the State nor the Federal Government is concerned with overweighting, the absence of a state provision parallel to the federal recognition of weight gain from moisture is of no consequence.

60% would not need to overpack at all. By contrast, a miller with a national marketing area would not know the destination of its flour when it was packaged and would therefore have to assume that the flour would lose weight during distribution. The national manufacturer, therefore, would have to overpack.

Similarly, manufacturers who distributed only in States that followed the federal standard would not be concerned with compensating for possible moisture loss during distribution. National manufacturers who did not exclude the nonconforming States from their marketing area, on the other hand, would have to overpack. Thus, as a result of the application of the California standard, consumers throughout the country who attempted to compare the value of identically labeled packages of flour would not be comparing packages which contained identical amounts of flour solids. Value comparisons which did not account for this difference—and there would be no way for the consumer to make the necessary calculations—would be misleading.

We therefore conclude that with respect to the millers' flour, enforcement of § 12211, as implemented by Art. 5, would prevent "the accomplishment and execution of the full purposes and objectives of Congress" in passing the FPLA. Under the Constitution, that result is impermissible, and the state law must yield to the federal.

The judgments are affirmed.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree that with respect to Rath's packaged bacon, § 12211 of the Cal. Bus. & Prof. Code and Art. 5 of 4 Cal. Admin. Code, c. 8, are pre-empted by the express pre-emptive provision of the Federal Meat Inspection Act, 21 U. S. C. § 678. I also agree that with respect to General Mills' flour, § 12211

and Art. 5 are not pre-empted by the express pre-emptive provision of the Fair Packaging and Labeling Act (FPLA), 15 U. S. C. § 1461. I am unable to agree, however, with the implicit pre-emption the Court finds with respect to the flour. This latter pre-emption is founded in unwarranted speculations that hardly rise to that clear demonstration of conflict that must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field.

With respect to labeling requirements for flour under the scheme contemplated by the FPLA in conjunction with the Federal Food, Drug, and Cosmetic Act, the Court determines that the state-law labeling requirements are neither "less stringent than" nor inconsistent with those federal requirements. This conclusion quite properly dictates the Court's holding that Congress has not expressly prohibited state regulation in this field. The remaining inquiry, then, is whether the two statutory schemes are in utter conflict.[1] As this Court noted in *Kelly* v. *Washington*, 302 U. S. 1, 10 (1937):

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

See also *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156 (1942); *Askew* v. *American Waterways Operators, Inc.*, 411 U. S. 325, 337, 341 (1973). When we deal, as we do here, with congressional action "in a field which the States have traditionally occupied," the basic assumption from which pre-

[1] There is no contention that the subject of the regulation is in its "nature national, or admit[ting] only of one uniform system . . . ." *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852). On the contrary, "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Avocado Growers* v. *Paul*, 373 U. S. 132, 144 (1963).

emption must be viewed is "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); cf. *De Canas* v. *Bica*, 424 U. S. 351, 356 (1976). I am simply unable to find that this stringent standard has been met in this case.

The Court's opinion demonstrates that it is physically possible to comply with the state-law requirement "without triggering federal enforcement action," *ante*, at 540. This leads the Court to conclude that the "state requirement is not inconsistent with federal law." *Ibid.* It also must lead to the conclusion that this is not a case "where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963). Preemption, then, if it is to exist at all in this case, must exist because the operation of the state Act inexorably conflicts with the *purposes* underlying the Federal Act. The Court relies on the fact that one of the purposes of the FPLA is to "facilitate value comparisons" among consumers, 15 U. S. C. § 1451. But merely identifying a purpose is not enough; it must also be shown that the state law inevitably frustrates that purpose. As we but recently noted:

> "We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. 'It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty.' The Federalist No. 32, p. 243 (B. Wright ed. 1961)." *Goldstein* v. *California*, 412 U. S. 546, 554–555 (1973) (emphasis in original).

Under the proper test, it is only

> "[i]f the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage* v. *Jones*, 225 U. S. 501, 533 (1912).

The Court's reliance on supposition and inference fails in two respects to demonstrate that respondents have carried their burden of demonstrating pre-emption. First, on the Court's own premises, there should be no finding of pre-emption. We are told, *ante*, at 526, that the relevant inquiry is "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written," while we are further told, *ante*, at 539, that there is, in fact, no "federal interest in preventing packages from being overfilled," since the Federal Government is not "concerned with overweighting in the administration of its weights and measures laws . . . ." Under these premises, it is hard to accept the Court's conclusion that, because of the federal purpose to facilitate consumer value comparisons,[2] the state law is pre-empted because some packages might contain more than the minimum weight stated and more than another company's similarly marked package. For, we have been told that, should a manufacturer deliberately overpack, for *whatever* reason,[3] there will be no federal action taken against him even though value comparisons might then "be misleading." It is virtually impossible to say, as the Court does, that "neither the State nor the Federal Government is concerned with over-

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[2] This purpose is not the only purpose underlying the Federal Act. Title 15 U. S. C. § 1451 also announces the congressional policy of labeling packages so as to "enable consumers to obtain accurate information as to the quantity of the contents . . . ."

[3] Including, one would have supposed, state compulsion.

weighting," *ante*, at 542 n. 41, and yet conclude that state-induced overweighting conflicts with a "value comparison" purpose, while, presumably, other overweighting does not. In viewing such a purpose to be sufficient to require pre-emption while the very purpose is ignored in practice by the administering federal agency reverses the normal presumption against finding pre-emption. The reasoning process which leads the Court to conclude that there is no express pre-emption, *ante*, at 540, leads me to conclude that there is no implied pre-emption.[4]

Second, and as troubling as the legal inconsistency, is the Court's reliance on unproved factual speculation in demonstrating the purported irreconcilable undermining of the federal purpose by the state statutory scheme. The premises the opinion must rely on are many. It acknowledges that flour packed under different humidity conditions would nonetheless comply with the federal standard, even though, as a result, similarly marked packages might contain different quantities of flour "solids," *ante*, at 542, and n. 39, but relies on the economics of the milling process to conclude that packers "will pack the same amount of [flour solids] into packages of any given size." This may normally be true as an economic fact, but it is not supported by the record and as a Court we have no way of knowing it from other sources.

Similarly defective is the reasoning process by which the majority concludes that local millers could adjust their packaging practices to specific humidity conditions, while national millers could not, since the national millers "would not know the destination of [their] flour when it was packaged and would therefore have to assume that the flour would lose weight during distribution." *Ante*, at 543. This assump-

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[4] The majority nowhere explains why its conclusion that the "state requirement is not inconsistent with federal law," *ante*, at 540, does not reflect on the fact that the state statutory scheme does not inevitably conflict with the federal.

tion, too, is unsupported by the record.[5] We simply have no basis for concluding that national distributors do not know, or could not know through the exertion of some modicum of effort, where their flour will end up. The possibility that a packer might have to incur some extra expense in meeting both systems simply does not mean that the "purposes of the act cannot otherwise be accomplished," *Savage* v. *Jones*, 225 U. S., at 533, nor does it demonstrate that "the two acts cannot 'be reconciled . . . ,'" *Kelly* v. *Washington*, 302 U. S., at 10.[6]

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[5] The Court's reliance on the possible differential effect of California's requirements on local and national millers is itself wholly speculative. To begin with, we do not know from the record that there are both "local" and "national" millers, however defined. Even if both exist, we simply do not know that local millers will ship flour only to areas with comparable humidity levels. Any miller might experience a variety of humidity conditions by shipping to two different areas, despite the fact that his operation may be considered local in that the two areas are relatively contiguous. Even in the same town, stores that are air-conditioned may have significantly different humidity conditions than exist elsewhere in the town. In such situations, the local millers would have to adjust their packing process to account for this differential, either by packing different quantities into different packages, and then tracing their distribution, or by overpacking all packages sufficiently to ensure that any possible humidity conditions could be met. The same would appear to be true for national millers. We simply, then, do not know that local millers and national millers would not be similarly affected. The Court's assertions to the contrary are nothing but speculations.

[6] For all that appears, packers could easily adjust their processes so as to insure compliance with the purposes of both Acts. Even if such adjustment should entail a minor economic inconvenience, it has nowhere been demonstrated that the imposition of a moderate economic burden conflicts with the purpose of the federal statutory scheme. California, in the exercise of its police powers, may be deemed to have believed that the benefits of its enactment outweigh these costs. Unless it can be shown that additional cost itself conflicts with a clear congressional purpose, the presumption is that our federal system of government tolerates such costs. And if added costs will vitiate the conflict, I do not see how it can be said that the statutory schemes necessarily conflict rather than

The assumptions in the Court's opinion not only are insufficient to compel a finding of implied pre-emption, they suggest an approach to the question of pre-emption wholly at odds with that enunciated in *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963). There, this Court was concerned with differing federal and state maturity standards for avocados grown in Florida. This Court rejected a test which looked to the similarity of purposes, *id.*, at 142, and noted instead that a manufacturer could have complied with both statutes by modifying procedures somewhat, *id.*, at 143, which demonstrated that there was "no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards," *ibid.* Nothing has been shown to demonstrate that this conclusion is not equally justified in the instant case.

The Court today demonstrates only that there could be—not that there must be—a conflict between state and federal laws.[7] Because reliance on this test to find pre-emption, absent an explicit pre-emptive clause, seriously misapprehends the carefully delimited nature of the doctrine of pre-emption, *Goldstein* v. *California*, 412 U. S., at 554, I dissent from the holding that § 12211 and Art. 5 are pre-empted with respect to General Mills' flour.

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just "may possibly" conflict. *Goldstein* v. *California*, 412 U. S. 546, 554 (1973).

[7] On its face, there is nothing inexorable about a conflict between a statute which, in effect, imposes a minimum weight requirement, and one whose purpose is to "enable consumers to obtain accurate information as to the quantity of the contents and [to] facilitate value comparisons." 15 U. S. C. § 1451.

MANESS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-6909. Argued March 22-23, 1977—Decided March 29, 1977

Certiorari dismissed. Reported below: 512 F. 2d 88.

Bennett H. Brummer argued the cause for petitioner. With him on the briefs was *Albert G. Caruana.*

Arthur Joel Berger, Assistant Attorney General of Florida, argued the cause for respondent *pro hac vice.* With him on the brief were *Robert L. Shevin,* Attorney General, and *William L. Rogers,* Special Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

Syllabus

NATIONAL GEOGRAPHIC SOCIETY *v.* CALIFORNIA BOARD OF EQUALIZATION

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 75–1868. Argued February 23, 1977—Decided April 4, 1977

Appellant Society, a nonprofit corporation with headquarters in the District of Columbia, which maintains two offices in California that solicit advertising for the Society's magazine but perform no activities related to the Society's mail-order business for the sale from the District of Columbia of maps, atlases, globes, and books, challenges the constitutionality of California's use tax, as applied to the Society's mail-order activities, which requires every retailer engaged in business in that State and making sales of tangible personal property for storage, use, or other consumption in that State to collect from the purchaser a use tax in lieu of the sales tax imposed on local retailers. Orders for the Society's sales items are mailed from California directly to appellant's headquarters on coupons or forms enclosed with announcements mailed to Society members and magazine subscribers or on order forms contained in the magazine. *Held:* California's imposition of the use-tax-collection liability on the Society's mail-order operation does not violate the Due Process Clause of the Fourteenth Amendment or the Commerce Clause since the Society's continuous presence in California in the two offices provides a sufficient nexus between the appellant and the State to justify imposition of the use-tax-collection liability as applied to appellant. The out-of-state seller appellant runs no risk of double taxation as the consumer's identification as a resident of the taxing State is obvious and appellant becomes liable for the tax only by failing or refusing to collect it from the resident consumer. Nor, contrary to appellant's contention, is it material that there is no relationship between the appellant's sales activity in California and the two advertising offices, for without regard to the nature of the offices' activities, they had the advantage of the same municipal services as they would have had if their activities had included assistance to the mail-order operations. Pp. 555–562.

16 Cal. 3d 637, 547 P. 2d 458, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. BLACKMUN, J.,

filed an opinion concurring in the result, *post*, p. 562. BURGER, C. J., and REHNQUIST, J., took no part in the consideration or decision of the case.

Arthur B. Hanson argued the cause for appellant. With him on the briefs were *Michael N. Khourie, Glenn L. Archer, Jr.*, and *Michael C. Durney*.

Philip M. Plant, Deputy Attorney General of California, argued the cause for appellee. With him on the brief were *Evelle J. Younger*, Attorney General, and *Ernest P. Goodman*, Assistant Attorney General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant National Geographic Society, a nonprofit scientific and educational corporation of the District of Columbia, maintains two offices in California that solicit advertising copy for the Society's monthly magazine, the National Geographic Magazine. However, the offices perform no activities related to the Society's operation of a mail-order business for the sale from the District of Columbia of maps, atlases, globes, and books. Orders for these items are mailed from California directly to appellant's Washington, D. C., headquarters on coupons or forms enclosed with announcements mailed to Society members and magazine subscribers or on order forms contained in the magazine. Deliveries are made by mail from the Society's Washington, D. C., or Maryland offices. Payment is either by cash mailed with the order or after a mailed billing following receipt of the merchandise. Such mail-order sales to California residents during the period involved in this suit aggregated $83,596.48.

**Harold T. Halfpenny* filed a brief for the Direct Mail/Marketing Assn., Inc., as *amicus curiae* urging reversal.

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg*, Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging affirmance.

California Rev. & Tax. Code § 6203 (West Supp. 1976) requires every "retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state" to collect from the purchaser a use tax in lieu of the sales tax imposed upon local retailers. The California Supreme Court held that appellant is subject to the statute as a "'retailer engaged in business in this state,'" because its maintenance of the two offices brings appellant within the definition under § 6203 (a) that includes "'[a]ny retailer maintaining . . . an office . . . .'" 16 Cal. 3d 637, 642, 547 P. 2d 458, 460–461 (1976). Section 6204 makes the retailer liable to the State for any taxes required to be collected regardless of whether he collects the tax.[1] See *Bank of*

[1] The relevant sections of the Cal. Rev. & Tax. Code provide:

§ 6203 (West Supp. 1976).

"Except as provided by Sections 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

. . . . .

"'Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following:

"(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business."

§ 6204 (West 1970).

"The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state."

The magazine is exempted from sales and use taxes as a "periodical." § 6362.

America v. *State Bd. of Equalization*, 209 Cal. App. 2d 780, 793, 26 Cal. Rptr. 348, 355 (1962).

The question presented by this case is whether the Society's activities at the offices in California [2] provided sufficient nexus between the out-of-state seller appellant and the State—as required by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause—to support the imposition upon the Society of a use-tax-collection liability pursuant to §§ 6203 and 6204, measured by the $83,596.48 of mail-order sales of merchandise from the District of Columbia and Maryland. The California Supreme Court held that the imposition of use-tax-collection liability on the Society violated neither Clause, 16 Cal. 3d 637, 547 P. 2d 458 (1976).[3] We noted probable jurisdiction. 429 U. S. 883 (1976). We affirm.

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[2] The offices are in San Francisco and Los Angeles and have been maintained since 1956. Each office was originally staffed with one salesman and one secretary, but each office has since increased its personnel to four. The basic function of the offices is to solicit advertising for the magazine, 16 Cal. 3d, at 640, 547 P. 2d, at 459–460. Sales of advertising copy by the two offices aggregate about $1 million annually. Tr. of Oral Arg. 6. During a nine-month period from August 1, 1963, to May 6, 1964, appellant Society also used these offices to make over-the-counter sales, upon which sales taxes were paid, of maps, atlases, globes, and books totaling $679.20 for the San Francisco office and $2,161.85 for the Los Angeles office. The California Supreme Court found it unnecessary to consider these sales in determining whether sufficient nexus was shown since the Society's office activities sufficed in its view adequately to prove sufficient nexus. 16 Cal. 3d, at 641 n. 6, 547 P. 2d, at 460 n. 6. We are of the same view.

[3] Although appellant's potential liability exceeds $180,000 and covers a nine-year period, *ibid.*, the assessment by the California Board of Equalization for the years involved in this case is $3,838.76, including interest and penalties. Appellant paid the assessment under protest and sued for its refund in State Superior Court and recovered a judgment. The California Court of Appeal, First Appellate District, affirmed. 121 Cal. Rptr. 77 (1975). The California Supreme Court reversed and sustained the assessment. 16 Cal. 3d 637, 547 P. 2d 458 (1976).

I

All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax. H. R. Rep. No. 565, 89th Cong., 1st Sess., 614 (1965). The constitutionality of such state schemes is settled. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 581 (1937); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934).[4]

But the limitation of use taxes to consumption within the State so as to avoid problems of due process that might arise from the extension of the sales tax to interstate commerce, see, *e. g.*, *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363 (1941); *Monamotor Oil Co.* v. *Johnson*, *supra*, at 95, does not avoid all constitutional difficulties. States necessarily impose the burden of collecting the tax on the out-of-state seller; the impracticability of its collection from the multitude of individual purchasers is obvious. *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, 343 (1954). However, not every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the State. The California Supreme Court concluded, based on its survey of the relevant decisions of this Court, that the "slightest presence" of the seller in California established sufficient nexus between the State and the seller constitutionally to support the imposition of the duty to collect and pay the tax. The California court stated, 16 Cal. 3d, at 644, 547 P. 2d, at 462:

"We are satisfied that from the above cited decisions

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[4] *Henneford* obviated the necessity for legislation sought by the National Asssociation of State Tax Administrators in the 73d through 76th Congresses to permit States to extend their sales taxes to certain interstate transactions. See H. R. Rep. No. 565, 89th Cong., 1st Sess., 613–615 (1965). Some 45 States and the District of Columbia require out-of-state sellers to collect use taxes on sales made to state residents. Brief for Direct Mail/Marketing Assn. as *Amicus Curiae* 4.

> the following principle can be distilled and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is *not* exclusively by means of the instruments of interstate commerce, the *slightest presence* within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so." (Emphasis supplied.)

Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's "slightest presence" standard of constitutional nexus. Appellant's maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually, Tr. of Oral Arg. 6, establish a much more substantial presence than the expression "slightest presence" connotes. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there adequately establish a relationship or "nexus" between the Society and the State that renders constitutional the obligations imposed upon appellant pursuant to §§ 6203 and 6204.[5] This conclusion is supported by several of our decisions.

The requisite nexus was held to be shown when the out-of-state sales were arranged by the seller's local agents working in the taxing State, *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62 (1939); *General Trading Co.* v. *Tax Comm'n*,

[5] Appellant Society argues that under the California Supreme Court's "slightest presence" test §§ 6203 and 6204 could be applied even if the Society maintained no offices in the State but merely owned a parking lot. But the sections were applied to appellant only because it maintained the offices. Appellant was therefore only subject to the law because it fell within "retailer engaged in business in this state" as defined in § 6203 (a).

322 U. S. 335 (1944), and in cases of maintenance in the State of local retail store outlets by out-of-state mail-order sellers. *Nelson* v. *Sears, Roebuck & Co., supra; Nelson* v. *Montgomery Ward,* 312 U. S. 373 (1941). In *Scripto, Inc.* v. *Carson,* 362 U. S. 207 (1960), the necessary basis was found in the case of a Georgia-based company that had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods," *id.,* at 211, although maintaining no office or place of business in Florida, and having no property or regular full-time employees there.

Standard Pressed Steel Co. v. *Washington Rev. Dept.,* 419 U. S. 560 (1975), is also instructive. That case involved a direct tax upon the gross receipts of a foreign corporation resulting from sales to a State of Washington customer, and not imposition of use-tax-collection duties. Although "a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation . . . ," *id.,* at 563, see *Monamotor Oil Co.* v. *Johnson, supra,* a concern not present when only imposition of use-tax-collection duty is involved, *Standard Pressed Steel* held that maintenance in the taxing State of a single employee, an engineer whose office was in his Washington home and whose primary responsibility was to consult with the Washington-based customer regarding its anticipated needs for the out-of-state supplier's product, established a sufficient relation to activities within the State producing the gross receipts as to support imposition of the tax. It is particularly significant for our purposes in this case that the Court characterized as "frivolous" the argument that the seller's in-state activities were so thin and inconsequential that the tax had no reasonable relation to the protection and benefits conferred by the taxing State, for the employee "made possible the realization and continuance of valuable contractual relations between [the seller and its Washington cus-

tomer]." 419 U. S., at 562. Other fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State. *Complete Auto Transit, Inc.* v. *Brady, ante,* p. 274; *General Motors Corp.* v. *Washington,* 377 U. S. 436 (1964); *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450 (1959); *Memphis Gas Co.* v. *Stone,* 335 U. S. 80 (1948); *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444 (1940).

The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger. See *Norton Co.* v. *Illinois Rev. Dept.,* 340 U. S. 534, 537 (1951). The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing State is self-evident. The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it. Compare *McLeod* v. *Dilworth Co.,* 322 U. S. 327 (1944) (sales tax), with *Scripto, Inc.* v. *Carson, supra,* and *General Trading Co.* v. *Tax Comm'n, supra.* See also *American Oil Co.* v. *Neill,* 380 U. S. 451, 454–455 (1965).

Two decisions that have held fact patterns deficient to establish the necessary nexus to impose the duty to collect the use tax highlight the significance of the inquiry whether the out-of-state seller enjoys services of the taxing State. *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340 (1954), struck down a Maryland assessment against a Delaware store near the border between the two States. The store had made over-the-counter sales to Maryland residents and occasionally shipped or delivered goods by truck into that State. The store advertised in Delaware by newspaper and radio, and some of these advertisements reached Maryland residents. These advertisements were sometimes supplemented with

"flyers" mailed to customers, some of whom lived in Maryland. The Court concluded that Maryland could not satisfy the due process requirement. In addition to the almost total lack of contacts between Maryland and the Delaware store—Marylanders went to Delaware to make purchases, the seller did not go to Maryland to make sales—the seller obviously could not know whether the goods sold over the counter in Delaware were transported to Maryland prior to their use. See *Scripto, Inc.* v. *Carson, supra,* at 212.

National Bellas Hess, Inc. v. *Illinois Rev. Dept.,* 386 U. S. 753 (1967), presented the question in the case of an out-of-state seller whose only connection with customers in the taxing State was by common carrier or mail. Illinois subjected appellant Bellas Hess, a national mail-order house centered in Missouri, to use tax liability based upon mail-order sales to customers in that State. Bellas Hess owned no tangible property in Illinois, had no sales outlets, representatives, telephone listings, or solicitors in that State, and did not advertise there by radio, television, billboards, or newspapers. It communicated with potential customers by mailing catalogues throughout the United States, including Illinois, twice a year and occasionally supplemented this effort by mailing out "flyers." All orders for merchandise were mailed to Bellas Hess' Missouri plant, and the goods were sent to customers by mail or common carrier. *Bellas Hess* held that, constitutionally, the basis for the requisite nexus was not to be found solely in Bellas Hess' mail-order activities in the State. The Court's opinion carefully underscored, however, the "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.,* at 758. Appellant Society clearly falls into the former category.

II

The Society argues, however, that its contacts with customers in California were related solely to its mail-order sales by means of common carrier or the mail, that the two offices played no part in that activity, and that therefore this case is controlled by *Bellas Hess*.[6] The Society argues in other words that there must exist a nexus or relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State. We disagree. However fatal to a direct tax a "showing that particular transactions are dissociated from the local business . . . ," *Norton Co.* v. *Illinois Rev. Dept., supra,* at 537; *American Oil Co.* v. *Neill, supra; Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77 (1938), such dissociation does not bar the imposition of the use-tax-collection duty.[7] It is true that *Sears, Roebuck* and *Montgomery Ward,* relied on by appellant, involved fact patterns that included proof of assistance by local operations of the mail-order business. Sears maintained 12 retail stores in the taxing State and was qualified to do business there. Sears' agents in the States, although not directly involved in the solicitation of the mail-order sales, at times assisted in processing such orders. The holding that Sears could not avoid use-tax liability did not, however, turn on that fact. The holding, rather, was that the fact Sears' business was departmentalized—the mail-order and retail stores operations were separately administered—did not preclude the finding of sufficient nexus. *Montgomery Ward,* a companion case to *Sears,*

[6] Appellant conceded at oral argument that *Bellas Hess* would have required reversal in the absence of the proof of maintenance of the two offices. Tr. of Oral Arg. 29, 34–35.

[7] Contrary to appellant's argument, Brief for Appellant 6, the fact that it has not registered to do business in California is not determinative against the validity of the application of §§ 6203 and 6204. See *General Trading Co.* v. *Tax Comm'n,* 322 U. S. 335 (1944); *Felt & Tarrant Co.* v. *Gallagher,* 306 U. S. 62 (1939).

Roebuck, presented a somewhat similar fact pattern. There the local retail stores engaged in local advertising of the mail-order merchandise. But here again we disagree that this fact was crucial to the Court's decision. Even if, as the Society argues, the fact patterns of *Sears* and *Montgomery Ward* may be regarded as the equivalent of the in-state solicitation by local agents found sufficient to supply the nexus for imposition of the use-tax-collection duty in *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62 (1939), see also *Scripto, Inc.* v. *Carson*, 362 U. S. 207 (1960) (local solicitation by commission "salesmen"); *General Trading Co.* v. *Tax Comm'n*, 322 U. S. 335 (1944) (traveling salesmen sent into taxing State); *Bowman* v. *Continental Oil Co.*, 256 U. S. 642 (1921) (local distributor and dealer); and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934) (local refining, storage, and distributing facilities), the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate "some definite link, some minimum connection, between [the State and] the *person* . . . it seeks to tax." *Miller Bros.* v. *Maryland*, 347 U. S., at 344–345. (Emphasis added.) Here the Society's two offices, without regard to the nature of their activities, had the advantage of the same municipal services—fire and police protection, and the like—as they would have had if their activities, as in *Sears* and *Montgomery Ward*, included assistance to the mail-order operations that generated the use taxes.

The Society's reliance on *Miller Bros. Co.* v. *Maryland*, *supra*, is also misplaced. The sales with respect to which Maryland sought to impose upon Miller the duty to collect its tax were of goods sold to residents of Maryland at Miller's Delaware store, although Miller made occasional deliveries in Maryland. Moreover, the lack of certainty that the merchandise sold over the counter to Maryland customers in

Delaware was transported to Maryland prior to its use militated against a finding of adequate nexus with respect to those purchases. *Scripto, Inc.* v. *Carson, supra,* at 212–213. The relational defect between the taxing State and the person or property sought to be taxed therefore obviated any relevance of a relationship between the State and the out-of-state retailer.

We conclude that the Society's continuous presence in California in offices that solicit advertising for its magazine provides a sufficient nexus to justify that State's imposition upon the Society of the duty to act as collector of the use tax.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in the result.

I am not at all convinced that the Court's facile distinction of *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340 (1954), on the ground that in that case "the seller obviously could not know whether the goods sold over the counter in Delaware were transported to Maryland prior to their use," *ante,* at 559, and that there was a "lack of certainty that the merchandise sold over the counter to Maryland customers in Delaware was transported to Maryland prior to its use," *ante,* at 561 and this page, is a proper and acceptable distinction. I thought that one of the factual difficulties of *Miller,* in the focus of the present case, was the Delaware seller's own *delivery* of goods to Maryland, some by common carrier and some by the seller's own truck. 347 U. S., at 341–342. Indeed, Miller Bros. stipulated that during the taxable period, it delivered or paid a common carrier to deliver $9,500 worth of merchandise to customers in Maryland ($8,000 through use of its truck, $1,500 by common carrier). *Id.,* at 350–351, n. 5. Miller Bros. exhibited no uncertainty as to the destination of those goods.

The Court appears to find an additional distinction in the fact that the goods in *Miller Bros.* were "sold to residents of Maryland at Miller's Delaware store," *ante*, at 561. If the Court intends thereby to rest a distinction on the fact that the sales were made out of State, I am at a loss to follow its reasoning. By definition, a use tax is imposed only on sales made out of State. In short, *Miller Bros.* is not so easily explained away.

Thus, it seems to me, we have another instance where this Court's past decisions in the tax area are not fully consistent. See *Complete Auto Transit, Inc.* v. *Brady*, *ante*, p. 274, and its development from its immediate predecessor, *Colonial Pipeline Co.* v. *Traigle*, 421 U. S. 100, 101 (1975).

In any event, I find myself in accord with the Court's result in the present case. If, as I suspect, the result today is not fully consistent with the result in *Miller*, I am content to let *Miller* go.

UNITED STATES *v.* MARTIN LINEN SUPPLY CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76–120. Argued February 23, 1977—Decided April 4, 1977

After a deadlocked jury was discharged when unable to agree upon a verdict at the criminal contempt trial of respondent corporations, the District Judge granted respondents' timely motions for judgments of acquittal under Fed. Rule Crim. Proc. 29 (c), which provides that "a motion for judgment of acquittal may be made . . . within 7 days after the jury is discharged [and] the court may enter judgment of acquittal. . . ." The Government appealed pursuant to 18 U. S. C. § 3731, which allows an appeal by the United States in a criminal case "to a court of appeals from a . . . judgment . . . of a district court dismissing an indictment . . . , except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The Court of Appeals dismissed the appeal. *Held:* The Double Jeopardy Clause bars appellate review and retrial following a judgment of acquittal entered under Rule 29 (c). Pp. 568–576.

(a) The "controlling constitutional principle" of the Double Jeopardy Clause focuses on prohibitions against multiple trials, *United States* v. *Wilson*, 420 U. S. 332, 346, and where an appeal by the Government presents no threat of successive prosecutions, the Clause is not offended. Pp. 568–570.

(b) The normal policy granting the Government the right to retry a defendant after a mistrial that does not determine the outcome of a trial does not apply here since valid judgments of acquittal were entered on the express authority of and in strict compliance with Rule 29 (c), and a successful governmental appeal reversing the judgments of acquittal would necessitate another trial or further proceedings to resolve factual issues going to the elements of the offense charged. Pp. 570–571.

(c) The judgments of acquittal here were "acquittals" in substance as well as form, since the District Court plainly granted the Rule 29 (c) motion on the express view that the Government had not proved facts constituting criminal contempt. Pp. 571–572.

(d) Rule 29 recognizes no legal distinction between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause. P. 573.

(e) Rule 29 contemplated no artificial distinctions between situations where the judge enters a judgment of acquittal prior to submission of the case to the jury under Rule 29 (a), or after submission but prior to the jury's return of a verdict under Rule 29 (b), and the jury is thereafter discharged, and the situation involved here, where the judge chose to await the outcome of the jury's deliberations and, upon its failure to reach a verdict, acted on a timely motion for acquittal after the jury's discharge. *United States* v. *Sanford*, 429 U. S. 14, distinguished. Pp. 573–575.

534 F. 2d 585, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 576. BURGER, C. J., filed a dissenting opinion, *post*, p. 581. REHNQUIST, J., took no part in the consideration or decision of the case.

Frank H. Easterbrook argued the cause for the United States *pro hac vice*. With him on the brief was *Solicitor General Bork*.

J. Burleson Smith argued the cause and filed a brief for respondents.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A "hopelessly deadlocked" jury was discharged when unable to agree upon a verdict at the criminal contempt trial of respondent corporations in the District Court for the Western District of Texas.[1] Federal Rule Crim. Proc. 29 (c) provides

[1] The criminal contempt proceeding was filed in 1971 and charged respondents, two commonly owned linen supply companies, and their president, William B. Troy, with violation of a consent decree entered in 1969 as the final judgment in an antitrust suit. The petitions were originally dismissed by the District Court but the dismissal was reversed by the Court of Appeals, 485 F. 2d 1143 (1973). The Government filed a supplemental criminal contempt petition on which trial was had in February 1975. On February 21, 1975, the jury was discharged after returning the not-guilty verdict as to Troy and announcing that it was "hopelessly deadlocked" as to respondent corporations. Six days later, on February 27, 1975, respondents filed their motions for judgments of

that in such case "a motion for judgment of acquittal may be made . . . within 7 days after the jury is discharged [and] the court may enter judgment of acquittal. . . ." [2] Timely motions for judgments of acquittal under the Rule made by respondents six days after the discharge of the jury resulted two months later in the entry by the District Court of judgments of acquittal.[3] The sole question presented for our

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acquittal under Rule 29 (c). On April 24, 1975, the District Court granted the motions and entered judgments of acquittal.

[2] Rule 29 provides:

"Motion for Judgment of Acquittal

"(a) MOTION BEFORE SUBMISSION TO JURY. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

"(c) MOTION AFTER DISCHARGE OF JURY. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

[3] After dismissal of the jury, the District Judge advised counsel for all parties that he would be inclined "to enter a judgment of acquittal as to [respondents] if an appropriate motion was made." App. 31. He said that he had "almost instructed a verdict for all Defendants" because the

decision is whether these judgments of acquittal under Rule 29 (c) are appealable by the United States pursuant to 18 U. S. C. § 3731. Section 3731 provides that an appeal by the United States in a criminal case "shall lie to a court of appeals from a . . . judgment . . . of a district court dismissing an indictment . . . , except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." [4] The Court of Appeals for the Fifth Circuit held that no appeal lay under § 3731 from the judgments of acquittal entered by the District Court under Rule 29 (c). 534 F. 2d 585 (1976). The Court of Appeals reasoned that, since reversal of the acquittals would enable the United States to try respondents a second time, the bar of the Double Jeopardy Clause "leads inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below." *Id.*, at 589.[5] We granted certiorari. 429 U. S. 917 (1976). We affirm.

Government's case "is without a doubt the weakest [contempt case that] I've ever seen." *Id.*, at 30.

[4] In pertinent part, § 3731 provides:

"§ 3731. Appeal by United States

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Although this provision authorizes appeal from a district court "dismiss[al]" rather than "acquittal," it is now established that the form of the ruling is not dispositive of appealability in a statutory sense, see *infra*, at 568.

[5] In characterizing the trial court's action as a "directed verdict," the Court of Appeals erred in terminology, for Rule 29 (a) expressly substitutes "judgment of acquittal" for "directed verdict." As shall be seen, however, see *infra*, at 573, the purely formal nature of the change in federal criminal procedure marked by Rule 29 speaks strongly in favor of treating Rule 29 judgments of acquittal the same as their predecessor directed verdicts for purposes of invoking double jeopardy. See *Fong Foo* v. *United States*, 369 U. S. 141 (1962).

I

It has long been established that the United States cannot appeal in a criminal case without express congressional authorization. *United States* v. *Wilson*, 420 U. S. 332, 336 (1975); *United States* v. *Sanges*, 144 U. S. 310 (1892). Only two Terms ago *Wilson* traced the uneven course of such statutory authority until 1970 when Congress amended the Criminal Appeals Act, 420 U. S., at 336–339, and that history need not be repeated here. See also *United States* v. *Sisson*, 399 U. S. 267, 307–308 (1970). It suffices for present purposes that this Court in *Wilson* found that in enacting § 3731 as Title III of the Omnibus Crime Control Act of 1970, 84 Stat. 1890, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." 420 U. S., at 337. Therefore, unless barred by the Double Jeopardy Clause of the Constitution, appeals by the Government from the judgments of acquittal entered by the District Court under Rule 29 (c) are authorized by § 3731.

Consideration of the reach of the constitutional limitations inhibiting governmental appeals was largely unnecessary during the prior regime of statutory restrictions. But see *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Kepner* v. *United States*, 195 U. S. 100 (1904). However, now that Congress has removed the statutory limitations to appeal and the relevant inquiry turns on the reach of the Double Jeopardy Clause itself, it has become "necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Government's appeal rights in criminal cases." *United States* v. *Wilson*, *supra*, at 339. In the few cases decided since 1970 that have taken this "closer look," many of the policies shaping restrictions on governmental appeal rights have been brought into sharper focus.

"The development of the Double Jeopardy Clause from its

common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." *Id.*, at 342. Thus *Wilson* held that the "controlling constitutional principle" focuses on prohibitions against multiple trials. *Id.*, at 346. At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957); see also *Downum* v. *United States*, 372 U. S. 734, 736 (1963). "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States* v. *Jorn*, 400 U. S. 470, 479 (1971) (Harlan, J.).[6]

In animating this prohibition against multiple prosecutions, the Double Jeopardy Clause rests upon two threshold conditions. The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy. *Serfass* v. *United States*, 420 U. S. 377 (1975). This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence. *Illinois* v. *Somerville*, 410 U. S. 458, 471 (1973) (WHITE, J., dissenting); *Downum* v. *United States*, *supra*. Further, where

[6] The Double Jeopardy Clause also accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense. See *Ex parte Lange*, 18 Wall. 163 (1874).

a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended. Thus a postverdict dismissal of an indictment after a jury rendered a guilty verdict has been held to be appealable by the United States because restoration of the guilty verdict, and not a new trial, would necessarily result if the Government prevailed. *United States* v. *Wilson, supra.*[7]

II

None of the considerations favoring appealability is present in the case of a Government appeal from the District Court's judgments of acquittal under Rule 29 (c) where the jury failed to agree on a verdict. The normal policy granting the Government the right to retry a defendant after a mistrial that does not determine the outcome of a trial, *United States* v. *Perez*, 9 Wheat. 579, 580 (1824), is not applicable since valid judgments of acquittal were entered on the express authority of, and strictly in compliance with, Rule 29 (c). Those judgments, according to the very wording of the Rule, act to terminate a trial in which jeopardy has long since attached.[8] And a successful governmental appeal reversing the judgments of acquittal would necessitate another trial, or, at least, "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged . . . ." *United States* v. *Jenkins*, 420 U. S. 358, 370 (1975). Therefore, the present case is not one where the

[7] The absence of a threatened second trial mitigates the possibility of governmental jury shopping and substantially reduces the expense and anxiety to be borne by the defendant. In addition, the Government's interest in preserving a conviction fairly attained obviously is far greater than its interest in investing additional time and resources in reprosecuting a defendant following a jury's failure to reach a verdict and a trial court's judgment of acquittal.

[8] A motion under Rule 29 for a judgment of acquittal can be entertained, at the earliest, "after the evidence on either side is closed . . . ." This stage of the trial obviously arises well after jeopardy has attached.

double jeopardy bar to appealability is automatically averted. Rather, we must inquire further into the constitutional significance of a Rule 29 (c) acquittal.

Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that "[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *United States* v. *Ball*, 163 U. S. 662, 671 (1896). In *Fong Foo* v. *United States*, *supra*, for example, a District Court directed jury verdicts of acquittal and subsequently entered formal judgments of acquittal. The Court of Appeals entertained the appeal of the United States and reversed the District Court's ruling on the ground that the trial judge was without power to direct acquittals under the circumstances disclosed by the record. We reversed, holding that, although the Court of Appeals may correctly have believed "that the acquittal was based upon an egregiously erroneous foundation, . . . [n]evertheless, '[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the defendants] twice in jeopardy, and thereby violating the Constitution.'" 369 U. S., at 143. See also *Kepner* v. *United States*, *supra*; *United States* v. *Sisson*, 399 U. S., at 289–290; *Serfass* v. *United States*, *supra*, at 392. In applying this teaching of *Ball*, *Fong Foo*, and like cases, we have emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action. *United States* v. *Sisson*, *supra*, at 270; cf. *United States* v. *Wilson*, 420 U. S., at 336.[9] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

There can be no question that the judgments of acquittal

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[9] The Court must inquire whether "the ruling in [defendant's] favor was actually an 'acquittal' even though the District Court characterized it otherwise." *United States* v. *Wilson*, 420 U. S. 332, 336 (1975).

entered here by the District Court were "acquittals" in substance as well as form. The District Court plainly granted the Rule 29 (c) motion on the view that the Government had not proved facts constituting criminal contempt.[10] The court made only too clear its belief that the prosecution was "'the weakest [contempt case that] I've ever seen.'" 534 F. 2d, at 587. In entering the judgments of acquittal, the court also recorded its view that "'the Government has failed to prove the material allegations beyond a reasonable doubt'" and that "'defendant should be found "not guilty."'"

Thus, it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction. The Court of Appeals concluded that this determination of insufficiency of the evidence triggered double jeopardy protection.[11] The Government, however, disputes the constitutional significance of the District Court's action. It submits that only a verdict of acquittal formally returned by the jury should absolutely bar further proceedings and that "[o]nce the district court declared a mistrial and dismissed the jury, any double jeopardy bar to a second trial dissolved." Brief for United States 21. We cannot agree.

Of course, as the Government argues, in a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see *Sparf & Hansen* v. *United States*, 156 U. S. 51, 105 (1895); *Carpenters* v. *United*

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[10] Rule 29 (a) in terms authorizes a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses."

[11] The only other Court of Appeals specifically to address this issue reached the same conclusion. *United States* v. *Suarez*, 505 F. 2d 166 (CA2 1974) (*per curiam*).

States, 330 U. S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

Such a limitation on the role of a trial judge, however, has never inhibited his ruling in favor of a criminal defendant. *Fong Foo* v. *United States*, 369 U. S. 141 (1962), establishing the binding nature of a directed verdict, is dispositive on that point. Since Rule 29 merely replaces the directed-verdict mechanism employed in *Fong Foo*, and accords the federal trial judge greater flexibility in timing his judgment of acquittal, no persuasive basis exists for construing the Rule as weakening the trial court's binding authority for purposes of double jeopardy.[12] Rather, the Notes of the Advisory Committee have confirmed that Rule 29 intends no substantive alteration in the role of judge or jury, but creates a purely formal modification of the directed-verdict device in order "to make the nomenclature accord with the realities." 18 U. S. C. App., p. 4504. Accordingly, *United States* v. *Sisson*, *supra*, at 290, held that Rule 29 recognizes no "legal distinction" between judge and jury with respect to the invocation of the protections of the Double Jeopardy Clause.

The Government, however, would read *Fong Foo* and, by implication, Rule 29 differently. It argues that the judge's directed verdict in *Fong Foo* was binding for double jeopardy

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[12] In the situation where a criminal prosecution is tried to a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect. See *United States* v. *Jenkins*, 420 U. S. 358, 365–367 (1975). Even though, as proposed here by the Government with respect to a Rule 29 judgment of acquittal, it can be argued that the prosecution has a legitimate interest in correcting the possibility of error by a judge sitting without a jury, the Court in *Jenkins* refused to accept theories of double jeopardy that would permit reconsideration of a trial judge's ruling discharging a criminal defendant.

purposes because the formal verdict of acquittal, though on direction, was rendered not by the judge, but by the jury, which then was discharged. This in effect turns the constitutional significance of a Rule 29 judgment of acquittal on a matter of timing. Thus, if the judge orders entry of judgment of acquittal on his own or on defendant's motion prior to submission of the case to the jury, as he may under Rule 29 (a), or after submission but prior to the jury's return of a verdict, as authorized by Rule 29 (b)—and the jury thereafter is discharged—the Government's argument necessarily concedes that the Double Jeopardy Clause would preclude both appeal and retrial. If, however, the judge chooses to await the outcome of the jury's deliberations and, upon its failure to reach a verdict, acts on a timely motion for acquittal filed under Rule 29 (c) within seven days of its discharge, the Government submits that the Double Jeopardy Clause should not bar an appeal.

We are not persuaded. Rule 29 contemplated no such artificial distinctions. Rather the differentiations in timing were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion. Insofar as the Government desires an appeal to correct error, irrational behavior, or prejudice on the part of the trial judge, its interest is not dependent on the point of trial when the judge enters his Rule 29 judgment, and suffers no special prejudice by a judge's acquittal after the jury disagrees and is discharged.[13] And to the extent that

[13] The Advisory Committee that framed Rule 29 explicitly noted that subdivision (c), permitting the entry of a judgment of acquittal after the jury's discharge, works no undue prejudice on the Government because the prosecution has no constitutionally sanctioned interest in receiving a verdict from the jury: "The constitutional requirement of a jury trial in criminal cases is primarily a right accorded to the defendant." 18 U. S. C. App., p. 4505. Cf. *Singer* v. *United States*, 380 U. S. 24 (1965). Any Government right to demand a jury verdict is limited to that afforded by Fed. Rule Crim. Proc. 23 (a) (jury trial waivable with the consent of the

the judge's authority under Rule 29 is designed to provide additional protection to a defendant by filtering out deficient prosecutions, the defendant's interest in such protection is essentially identical both before the jury is allowed to come to a verdict and after the jury is unable to reach a verdict: In either case, the defendant has neither been condemned nor exculpated by a panel of his peers and, in the absence of intervention by the trial judge, his vindication must await further action by a jury.

We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29 (c) after a jury mistrial no less than under Rule 29 (a) or (b). *United States* v. *Sanford*, 429 U. S. 14 (1976), does not dictate a contrary result. In *Sanford*, a jury trial ended in the declaration of a mistrial. A judgment of acquittal was never entered. Some four months later, with the second trial well into the preparatory stage, the trial court dismissed the prosecution's indictment. Because the dismissal "occurred several months after the first trial had ended in a mistrial, but before the retrial of respondents had begun," *id.*, at 16, the Court characterized the judge's dismissal as "a pretrial order," *ibid.*, and concluded that its appealability was governed by *Serfass* v. *United States*, 420 U. S. 377 (1975). The Court's linking of *Sanford* with *Serfass* highlights the distinctiveness of an acquittal under Rule 29 (c). In *Serfass* the Court carefully distinguished between appeal of a pretrial order and appeal of " 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case.' " 420 U. S., at 393, quoting *United States* v. *Sisson*, 399 U. S., at 290 n. 19. A Rule 29 acquittal, however, falls squarely within the latter category: By the very language of

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Government) and, of course, can be qualified by authority granted the trial judge under Rule 29.

the Rule, such a judgment of acquittal plainly concludes a pending prosecution in which jeopardy has attached, following the introduction at trial of evidence on the general issue. In that circumstance we hold that "although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review." *United States* v. *Wilson*, 420 U. S., at 348.

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, concurring in the judgment.

There is no statutory authority for a Government appeal from a judgment of acquittal in a criminal case. The plain language of 18 U. S. C. § 3731, together with its unambiguous legislative history, makes it perfectly clear that Congress did not authorize—and did not intend to authorize—appeals from acquittals.[1]

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[1] The contrary dictum in *United States* v. *Wilson*, 420 U. S. 332, 336–339; *United States* v. *Jenkins*, 420 U. S. 358, 363–364; *Serfass* v. *United States*, 420 U. S. 377, 383–387, is not controlling for these reasons: First, the statutory issue was not in dispute in any of those cases. Two of the defendants expressly conceded the applicability of the statute in their cases, Brief for Respondent in *United States* v. *Wilson*, O. T. 1974, No. 73–1395, p. 2; Brief for Respondent in *United States* v. *Jenkins*, O. T. 1974, No. 73–1513, p. 10. The third defendant simply failed to address the statutory issue, see Brief for Petitioner in *Serfass* v. *United States*, O. T. 1974, No. 73–1424, probably because his case involved a pretrial dismissal of the indictment. Hence, the Court was unaided by an adversary presentation of the issue. Moreover, re-examination of the language used in the decisions would not undermine their holdings. The two cases in which the Court upheld the Government appeal clearly did not involve acquittals on the merits. (*Serfass* was a pretrial dismissal; *Wilson* was a dismissal on speedy trial grounds.) The third case, *Jenkins*,

Prior to its most recent amendment in 1970, the Criminal Appeals Act had been a source of great confusion, "a most unruly child that has not improved with age," *United States* v. *Sisson*, 399 U. S. 267, 307. The Act had been construed to incorporate obscure distinctions between various types of dismissals, some of which were appealable directly to this Court, some to the court of appeals, and some that could not be appealed to either court.[2] However, the one thing that had always been clear was that "no appeal [could] be taken by the Government from an acquittal no matter how erroneous the legal theory underlying the decision," *id.*, at 299.

The 1970 amendment changed the law by eliminating all distinctions between different kinds of dismissals, but neither the present statute nor any of its predecessors has ever authorized an appeal from an acquittal. The statute, in relevant part, now reads:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court *dismissing an indictment or information* as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U. S. C. § 3731 (emphasis added).

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arguably involved an acquittal, but the Court held on constitutional grounds that the appeal was barred.

Second, as I indicate in the text, *infra*, at 581, it is perfectly clear that the dictum is incorrect. In view of our special responsibility for supervising the proper functioning of the federal criminal justice system, we should not hesitate to correct a plain mistake involving a technical problem of procedure when there has been no prejudicial reliance on that mistake.

[2] The difficulty of the problems presented by the statute is illustrated by the sharply divided conclusions reached in the various opinions in cases such as *United States* v. *Sisson*, 399 U. S. 267; *United States* v. *Ponto*, 454 F. 2d 657 (CA7 1971) (en banc); *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (CA9 1959) (en banc).

There is nothing in this statutory language to suggest that a judgment of acquittal, as opposed to a dismissal, is appealable.

The legislative history demonstrates that Congress intended to eliminate nonconstitutional barriers to appeals from dismissals, but did not intend to allow appeals from acquittals. As this Court has recognized, the Senate Report is the key to the legislative history.[3] The Report opens by describing the purpose of the bill as being "to resolve serious problems which frequently have arisen with respect to the right of the United States to appeal rulings which terminate prosecutions *other than by judgments of acquittal* . . . ." S. Rep. No. 91–1296, p. 2 (1970) (emphasis added). Apart from the problem of direct Supreme Court review, the Report states that the "major problem that has arisen under the present statute concerns the total lack of appealability of *certain kinds of dismissals and suppressions.*" *Id.*, at 4 (emphasis added). The Report then discusses at length the then-existing limitations on appeals from dismissals.[4] The Committee believed

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[3] The significance of this Senate Report in understanding the Act was well expressed in *Serfass* v. *United States*, *supra*, at 387 n. 10:

"The relevance and significance of the 'well considered and carefully prepared' report of the Senate Judiciary Committee, see *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 395 (1951) (Jackson, J., concurring), is not affected by the fact that the amendments proposed by the Committee and adopted without change by the Senate were modified by the House-Senate Conference Committee. See H. R. Conf. Rep. No. 91–1768, p. 21 (1970). The latter report contains no explanation of the changes made, and the changes themselves are consistent with the intent expressed in the Senate Report. See *United States* v. *Wilson*, *ante*, at 337–339."

[4] Subsection A is entitled "The Nature of the District Court Decision as a Limitation on Appeals from Dismissals," and begins with the statement that "[t]he now-archaic terminology employed in the original statute . . . unnecessarily precludes the Government from appealing many dismissals of prosecutions." S. Rep. No. 91–1296, at 5. The Report then states that the current Act "does not provide for an appeal by the United States to any court in a large variety of cases where the dismissal is based

that the Constitution allowed the Government to appeal any dismissal, *id.*, at 7–12, and stated that the bill was "intended to be liberally construed so as to effectuate its purpose of permitting the Government to appeal from *dismissals* of criminal prosecutions by district courts in all cases where the Constitution permits . . . ." *Id.*, at 18 (emphasis added). On the other hand, the Committee believed that the Constitution barred any appeal from an acquittal or from a dismissal amounting to an acquittal; "[a] true acquittal is based upon the insufficiency of the evidence to prove an element of the offense." *Id.*, at 11.

The same understanding was demonstrated by the bill's sponsor when he presented the Senate Report on the floor. He summarized the bill as providing that "the Government has the right to appeal any ruling by a district court in a criminal case which dismisses a prosecution in favor of a defendant except where the ruling is an acquittal"; he also presented a letter from the Solicitor General explaining that the bill would allow "an appeal from any dismissal except one amounting to a 'judgment of acquittal,' *i. e.*, a factual judgment that the defendant is not guilty of the crime charged and is thereby entitled to protection against double jeopardy." 116 Cong. Rec. 35659 (1970) (remarks of Sen. Hruska).

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on grounds having nothing to do with any defect in the indictment, or the construction or invalidity of the underlying statute." *Ibid.* The Report gives as examples dismissals for failure of the prosecution to comply with discovery or for lack of timely prosecution. The Report then refers to the use of old common-law terms like " 'judgment sustaining a motion in bar,' " giving rise to problems like that which the Court confronted in *United States* v. *Sisson*, *supra*. S. Rep. No. 91–1296, p. 6.

Subpart B of the Senate Report deals with "The Attachment of Jeopardy as a Limitation on Appeals from Dismissals." This section was concerned with appeal of "a decision sustaining a motion in bar after jeopardy has attached," *ibid.* Congress was concerned that a defendant could reserve issues of law until the trial and then preclude any possible review. *Id.*, at 7. An example was a case in which the trial judge ruled the Selective Service Act unconstitutional during the trial. *Id.*, at 11.

As the Court explained in *Wilson*, the Conference Committee made a minor change in the wording of the bill. See *Wilson*, 420 U. S., at 338. That change narrowed the bill in two respects. The Senate bill had allowed appeals from dismissals and also from any order "terminating a prosecution in favor of a defendant," and had expressly barred appeals from a judgment of acquittal.[5] In short, as the Conference Committee stated, the Senate bill authorized an appeal from "any decision or order terminating a prosecution except an acquittal," H. R. Conf. Rep. No. 91–1768, p. 21 (1970). The Conference Committee's change narrowed the bill by deleting the reference to orders "terminating a prosecution in favor of a defendant," leaving only dismissals appealable. (This deletion rendered superfluous the exception for acquittals, which was also deleted.) The Committee's change also narrowed the bill by barring any appeal, even from a dismissal, when further prosecution would violate double jeopardy.

An attempt to authorize the Government to appeal from acquittals would have represented a radical change in the law. The sponsor of the bill apparently did not understand the legislation to have such far-reaching effects; he described it as "noncontroversial legislation which would do away with unnecessary and perplexing jurisdictional problems in appeals by the Government in criminal cases . . . ." 116 Cong. Rec. 35659 (1970) (remarks of Sen. Hruska). Similarly, the Conference Report describes the Senate bill as merely eliminating "[t]echnical distinctions . . . on appeals by the United States," H. R. Conf. Rep. No. 91–1768, *supra*, at 21.[6]

[5] The bill provided that an appeal would lie "from a decision, judgment or order of a district court dismissing an indictment or information or terminating a prosecution in favor of a defendant as to one or more counts, except that no appeal shall lie from a judgment of acquittal." S. 3132.

[6] When the Conference bill was reported back to both Houses, its provision on appeals was described in cautious terms hardly appropriate to a proposal to go to the constitutional limits: in the Senate, as "authoriz[ing]

Interpreting legislative history is sometimes a perplexing and uncertain task. In this instance, however, the legislative history is absolutely clear: Congress was interested solely in expanding the Government's right to appeal from the dismissal of an indictment; it had no desire to allow appeals from acquittals and believed such appeals would be unconstitutional.

Since I am satisfied that Congress has not authorized the Government to appeal from a judgment of acquittal, the only question presented is whether such a judgment was entered in this case. The answer to that question, as the Court demonstrates, is perfectly clear. By virtue of Fed. Rule Crim. Proc. 29 (c), the mistrial did not terminate the judge's power to make a decision on the merits. His ruling, in substance as well as form, was therefore an acquittal.[7] For this reason, I concur in the Court's judgment.

MR. CHIEF JUSTICE BURGER, dissenting.

The order of acquittal in favor of respondents was entered by the District Judge after a mistrial had been declared due to a jury deadlock. Once the jury was dismissed, respondents

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appeals in *certain* classes of criminal cases," 116 Cong. Rec. 42147 (1970) (remarks of Sen. McClellan) (emphasis added); in the House, as an amendment "to broaden and clarify the right of the Government to appeal dismissals of criminal cases," *id.*, at 42197 (remarks of Rep. Celler).

[7] As we pointed out in *United States* v. *Sanford*, 429 U. S. 14, the mistrial in that case was entirely different because the proceedings in the trial court terminated without any decision on the merits.

"The trial of respondents on the indictment terminated, not in their favor, but in a mistrial declared, *sua sponte*, by the District Court. Where the trial is terminated in this manner, the classical test for determining whether the defendants may be retried without violating the Double Jeopardy Clause is stated in Mr. Justice Story's opinion for this Court in *United States* v. *Perez*, 9 Wheat. 579, 580 (1824):

" 'We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. . . .' " *Id.*, at 15.

ceased to be in jeopardy in that proceeding; they could no longer be convicted except after undergoing a new trial. For a century and a half it has been accepted that a defendant may properly be reprosecuted after the declaration of such a mistrial, *United States* v. *Perez*, 9 Wheat. 579 (1824). Therefore the District Judge's ruling here was made "prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." *United States* v. *Sanford*, 429 U. S. 14, 16 (1976).[1]

The present case cannot be distinguished from *Sanford* in constitutionally material respects. It is true that the District Judge here phrased his order as an acquittal rather than as a dismissal, and that the order was entered pursuant to a timely Rule 29 (c) motion. However, such mechanical niceties are not dispositive of whether retrial would expose defendants to double jeopardy; our Fifth Amendment inquiry should focus on the substance rather than the form of the proceedings below. In ruling on a motion for acquittal the District Judge must pass on the sufficiency, *not* on the weight, of the Government's case, *United States* v. *Isaacs*, 516 F. 2d 409, 410 (CA5), cert. denied, 423 U. S. 936 (1975); *United States* v. *Wooten*, 503 F. 2d 65, 66 (CA4 1974). "[T]he applicable standard is whether [the District Judge as a trier of fact]

[1] *Fong Foo* v. *United States*, 369 U. S. 141 (1962), on which the Court relies so heavily, is not in point. There the District Judge directed a verdict while the original trial was still in progress. Unlike the case before us, the jury there was still properly empaneled, and had not yet even begun to deliberate. Where the District Judge interrupts the trial process, important rights of the defendant may be jeopardized. The opportunity to try the case is frustrated so that the possibility of an acquittal from the originally empaneled jury is lost. No such rights are implicated where, as here, the original trial has ended when the jury cannot agree; at that point the defendant is already subject to a second trial. Thus, the timing of the District Court's order is not, as the Court suggests, an irrelevant technicality. A midtrial judgment of acquittal interrupts the trial process at a time when the defendant is constitutionally entitled to have it proceed to verdict.

could, not whether he *would*, find the accused guilty on the Government's evidence." *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 574 (CA2 1961) (emphasis in original).

The District Judge's ruling is thus plainly one of law, not of fact; it could only exonerate, not convict, the defendant. No legitimate interest of the defendant requires that this ruling be insulated from appellate review. On the other hand, barring the appeal jeopardizes the Government's substantial interest in presenting a legally sufficient case to the jury. The Court's holding today is thus wholly inconsistent with the intent of Rule 29 (c) as described by the drafters in the Advisory Committee Notes. In explaining the 1966 amendments to the Rule, the Notes expressly state: "No legitimate interest of the government is intended to be prejudiced by permitting the court to direct an acquittal on a post-verdict motion." 18 U. S. C. App., p. 4505. Surely the well-recognized right to reprosecute is such a "legitimate interest of the government," and should remain unaffected by the District Judge's order of acquittal.

Nor will the interest of clarity and consistency in the administration of the criminal justice system be served by today's holding. By hinging the outcome of this case on the timing of the post-trial motion and the label on the order, the Court is elevating form over substance and undermining the theoretical framework established by the *Wilson-Jenkins-Serfass* trilogy [2] of two Terms ago and the *Sanford* and *United States* v. *Morrison*, 429 U. S. 1 (1976), decisions earlier this Term. All litigants in our criminal courts—Government and defendants alike—are harmed by the uncertainty thus created. For these reasons, I cannot join the Court's holding and I respectfully dissent.

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[2] *United States* v. *Wilson*, 420 U. S. 332 (1975); *United States* v. *Jenkins*, 420 U. S. 358 (1975); *Serfass* v. *United States*, 420 U. S. 377 (1975).

ROSEBUD SIOUX TRIBE *v.* KNEIP, GOVERNOR OF SOUTH DAKOTA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-562. Argued January 12, 1977—Decided April 4, 1977

Both the language and legislative history of the Acts of 1904, 1907, and 1910, whereby land in certain counties in South Dakota located within the boundaries of the Rosebud Sioux Reservation as defined in an 1889 Treaty was required to be ceded by the Reservation Indians to the Government for sale to settlers under the homestead and townsite laws with the proceeds to be credited to the Indians only as received or, with respect to certain parcels, for transfer to South Dakota for school use, *held* clearly to evidence a congressional intent to diminish the boundaries of the Reservation. Although such Acts were unilateral Acts of Congress without the consent of three-fourths of the Rosebud Sioux Tribe's adult male members as was required by the original 1868 Treaty establishing the Reservation, that fact does not directly bear on the question whether Congress by these later Acts intended to diminish the Reservation boundaries. Nor is it conclusive with respect to congressional intent that these Acts changed the method of payment from an outright, fixed-sum payment to the Indians required by a 1901 Agreement that would have amended the 1889 Treaty and would have resulted in a diminution of the Reservation boundaries, but which, although approved by three-fourths of the Tribe's adult male members, was never ratified by Congress. Pp. 586-615.

521 F. 2d 87, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined, *post*, p. 615.

Marvin J. Sonosky argued the cause and filed briefs for petitioner.

William J. Janklow, Attorney General of South Dakota, argued the cause for respondents. With him on the brief were

Tom D. Tobin and *David L. Knudson*, Special Assistant Attorneys General, and *William F. Day, Jr.*

H. Bartow Farr argued the cause for the United States *pro hac vice* as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork, Assistant Attorney General Taft, Edmund B. Clark*, and *Neil T. Proto.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In June 1972, the Rosebud Sioux Tribe sued in the United States District Court for the District of South Dakota to obtain a declaratory judgment that the original boundaries of their reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been diminished by three subsequent Acts of Congress passed in 1904, 1907, and 1910 respectively.[1] The District Court, noting that "[f]rom the time these acts were passed, these [four] counties have been treated as outside the Rosebud Sioux Reservation by the settlers, their descendants, the State of South Dakota and the federal courts," 375 F. Supp. 1065, 1084, denied relief. It concluded that Congress had intended to diminish the Reservation so as to exclude the four counties in South Dakota affected by the 1904, the 1907, and the 1910 Acts. The United States Court of Appeals for the Eighth Circuit, in a careful and comprehensive opinion, affirmed the judgment of the District Court. 521 F. 2d 87. We granted certiorari, 425 U. S. 989, to review this determination in the light of our recent decisions in *DeCoteau* v. *District County Court*, 420 U. S. 425 (1975), and *Mattz* v. *Arnett*, 412 U. S. 481 (1973). Since we conclude that the three Acts

*Briefs of *amici curiae* urging reversal were filed by *Richard A. Baenen* and *R. Anthony Rogers* for the Arapahoe Tribe et al.; by *Arthur Lazarus, Jr.*, for the Association on American Indian Affairs, Inc., et al.; and by *Richard B. Collins* and *Robert S. Pelcyger* for the National Congress of American Indians et al.

[1] Act of Apr. 23, 1904, 33 Stat. 254; Act of Mar. 2, 1907, 34 Stat. 1230; Act of May 30, 1910, c. 260, 36 Stat. 448.

of Congress in question satisfy the requirement that "[a] congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," *Mattz* v. *Arnett, supra,* at 505, we affirm the judgment of the Court of Appeals.

I

When established, the Rosebud Indian Reservation contained somewhat over 3.2 million acres, and covered all or a portion of what later became five counties in South Dakota: Gregory, Tripp, Lyman, Mellette, and Todd. The three Acts we are asked to construe successively disposed of all unallotted lands in Gregory County (1904 Act), in Tripp and Lyman Counties (1907 Act), and in Mellette County (1910 Act). Only Todd County remains unaffected by these post-1889 enactments. The contention of the Rosebud Sioux Tribe is that these Acts, while opening up the unallotted land outside of Todd County to non-Indian settlement, did not thereby change the Reservation boundaries, which continued to encompass these five counties.

In determining whether or not the 1889 Reservation boundaries were subsequently diminished by congressional enactments, we are guided by well-established legal principles. The underlying premise is that congressional intent will control. *DeCoteau* v. *District County Court, supra,* at 444, 449; *United States* v. *Celestine,* 215 U. S. 278, 285 (1909). In determining this intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 174 (1973), quoting *Carpenter* v. *Shaw,* 280 U. S. 363, 367 (1930); see also *Mattz* v. *Arnett, supra,* at 505. The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation

status. *Mattz* v. *Arnett, supra;* see also *Seymour* v. *Superintendent,* 368 U. S. 351 (1962). But the "general rule" does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *DeCoteau* v. *District County Court, supra.* In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye toward determining what congressional intent was. *Mattz* v. *Arnett, supra,* at 505.

Applying these principles to the facts of this case, we conclude that the Acts of 1904, 1907, and 1910 did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation. The parties agree that an amendment to the 1889 Treaty, which provided for a fixed-sum payment and which was approved by three-fourths of the Rosebud Sioux Tribe's adult males in 1901, would have resulted in the diminution of the Rosebud Reservation boundaries. Congress did not, however, approve the 1901 amendment to the Treaty which the Tribe had ratified. The Tribe contends that, lacking tribal ratification and a fixed-sum provision, the later Acts were ineffectual to accomplish this same result. In the Tribe's view, the absence of these two factors vitally distinguishes the Acts in question from the otherwise similar Act examined in *DeCoteau* v. *District County Court, supra.* Because of the reasons hereafter set forth in greater detail, we conclude that, although the Acts of 1904, 1907, and 1910 were unilateral Acts of Congress without the consent of three-quarters of the members of the tribe required by the original Treaty,[2] that fact does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the Reservation boundaries. By the time of

[2] The written consent of a majority of the Tribe was obtained prior to the 1904 and 1907 Acts, *infra,* at 593, 607; no written consent was obtained prior to the 1910 Act, but the " 'practically unanimous' " concurrence of the Indians was reported, *infra,* at 610.

the first of these Acts, in 1904, Congress was aware of the decision of this Court in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty. We also conclude that the changed method of payment is not conclusive with respect to congressional intent. Although the later Acts of Congress made less secure provisions for payment to the Tribe for the lands in question than did the 1901 Treaty, their language with respect to the reservation status of the opened lands was identical with or derivative from the language used in that proposed amendment.[3] The language was also substantially equivalent to that used in the executed agreement involved in *DeCoteau*. We agree with the Court of Appeals and the District Court that this language not only opened the land for settlement, but diminished the boundaries of the Reservation *pro tanto*.[4]

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[3] The Tribe was eventually paid for all of the land opened to settlement in the three Acts, with the exception of some 4,600 acres, which were returned to the Tribe pursuant to an "Order of Restoration" dated January 12, 1938. See Indian Reorganization Act, 48 Stat. 984.

[4] The focus of our inquiry is congressional intent. This Court has pointed in its prior decisions to factors from which intent is inferred. The dissent erroneously seizes upon several factors and presents them as apparent absolutes, *post*, at 617–618. This, however, misapprehends the nature of our inquiry, which is to inquire whether a congressional determination to terminate is "expressed on the face of the Act or [is] clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973). *Mattz*, upon which the dissent relies, did not set forth absolutes. Rather, it first examined the history of the Reservation, *id.*, at 485–494, and then examined the enactment in light of this history and other surrounding circumstances. While in footnote 22 of *Mattz* we referred to examples of cases in which Congress had used "clear language of express termination" in particular situations, the notion that such express language in an Act is the *only* method by which congressional action may result in disestablishment is quite inconsistent with the just-quoted language from the text of *Mattz*. The dissent nonetheless relies on what it perceives to be an absence of any express disestablishment language

II

The Rosebud Sioux are one of the tribes of Indians of the Sioux Nation. The Treaty of April 29, 1868, 15 Stat. 635, set aside all the land in South Dakota west of the Missouri River as the Great Sioux Reservation, consisting of some 25 million acres. Article 12 of the Treaty provided that no subsequent treaty for the cession of any part of the reservation would be valid without the written consent of three-fourths of the adult male Indians on the reservation. Despite this provision, in 1877 approximately 7.5 million acres, consisting of the Black Hills portion of the Great Sioux Reservation, were removed from the Reservation by the Act of February 28, 1877, 19 Stat. 254. See *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943). Of the remaining Reservation, approximately one-half was "restored to the public domain" under the Act of March 2, 1889, 25 Stat. 896, § 21,[5] while six separate Reservations were carved out of the remainder, §§ 1–6. Section 2 set apart the Rosebud Reservation, encompassing what were later organized as three full counties (Todd, Mellette, and Tripp), a major portion of Gregory County, and a small portion of Lyman.[6] This Reservation, as originally delimited, contained over 3.2 million acres.

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as that which is "perhaps most striking about the Rosebud Acts . . . ." *Post*, at 618. Even then, however, the dissent concedes, as it must, that this "most striking" fact is not a fact at all with respect to the crucial 1904 Act: There Congress *used* cession language which *DeCoteau* v. *District County Court*, 420 U. S. 425, 445 (1975), found to be "precisely suited" to disestablishment.

[5] This termination of Reservation status was agreed to by three-fourths of the adult male Indians on the Great Sioux Reservation, S. Ex. Doc. 51, 51st Cong., 1st Sess., 234, 242 (1890).

[6] Under § 12, 25 Stat. 892,

"at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of

Around the turn of the century, the "familiar forces" to which we referred in *DeCoteau* v. *District County Court*, led to demands to open up the Reservation.[7] A provision in the Indian Department Appropriation Act, Mar. 3, 1901, 31 Stat. 1077, provided:

> "[T]he Secretary of the Interior be, and he is hereby, authorized, in his discretion, to negotiate, through any United States Indian inspector, agreements with any Indians for the cession to the United States of portions of their respective reservations or surplus unallotted lands, any agreements thus negotiated to be subject to subsequent ratification by Congress."

Shortly thereafter Inspector James McLaughlin was instructed by the Commissioner of Indian Affairs to begin "negotiations with the Indians of the Rosebud reservation, in South Dakota, for the cession of the unallotted eastern portion of their reserve." Letter dated Mar. 19, 1901, from W. A. Jones, Commissioner, Office of Indian Affairs, Department of Interior. Following meetings with members of the Tribe during the spring and summer of 1901, Inspector McLaughlin obtained the written consent of three-fourths of the

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the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress . . . ."

This reproduced, *verbatim*, the language of the General Allotment Act, § 5, Act of Feb. 8, 1887, 24 Stat. 389.

[7] See H. R. Rep. No. 486, 56th Cong., 1st Sess., 1 (1900): "The people are anxious that this particular part of the reservation be opened and opportunity given for settlement and development of that region of the State. . . .

"The committee is informed the Indians are willing to treat for a cession of the lands in question."

male Indian adults to the cession of some 416,000 acres of unallotted land in Gregory County for the sum of $1,040,000, subject to congressional ratification.[8] The negotiated Agreement, however, was never ratified,[9] "because of the fact that it provided that the Government should pay for the lands outright . . . ." 38 Cong. Rec. 1423 (1904) (remarks of Rep. Burke).[10]

What is important for our purposes is the undisputed fact that the 1901 Agreement, had it been ratified by Congress, would have disestablished that portion of the Rosebud Reservation which lay in Gregory County. Inspector McLaughlin explained to the Tribe that "[t]he cession of Gregory County" by ratification of the Agreement "will leave your reservation a compact, and almost square tract, and would leave your

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[8] Agreement, dated Sept. 14, 1901, between James McLaughlin, on the part of the United States, and the Sioux Tribe of Indians belonging on the Rosebud Reservation:

"ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota . . . .

"ART. II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to expend for and pay to said Indians, in the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars." S. Doc. No. 31, 57th Cong., 1st Sess., 28 (1901).

[9] In 1902, a ratification bill passed the Senate and was reported favorably in the House. 35 Cong. Rec. 5024 (1902); H. R. Rep. No. 2099, 57th Cong., 1st Sess. (1902). The bill was never given any consideration on the floor of the House.

[10] See also S. Rep. No. 3271, 57th Cong., 2d Sess., 2 (1903); 36 Cong. Rec. 2748 (1903) (remarks of Sen. Gamble). Congressman Burke and Senator Gamble were the sponsors of the various bills concerning the Rosebud Reservation. As the Court of Appeals noted, and as all parties appear to agree: "The problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money." 521 F. 2d 87, 94.

reservation about the size and area of Pine Ridge Reservation." [11] It is conceded that his description was correct; the effect and intent of the 1901 Agreement, if ratified, would have been to change the Reservation boundaries. As we noted in *DeCoteau* v. *District County Court*, 420 U. S., at 445, in construing virtually identical language: "The Agreement's language . . . was precisely suited to this purpose [of disestablishment]." In this Agreement, therefore, we have—unlike the situation in *Mattz* v. *Arnett*, 412 U. S. 481 (1973)—an unmistakable baseline purpose of disestablishment.

An examination of the legislative processes which resulted in the 1904 Act convinces us, as it did the lower courts, that this purpose was carried forth and enacted. Because of the history of the 1901 Agreement, the 1904 Act cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of the Rosebud Reservation.

In 1903, new bills were introduced, and subsequently reported from committee in both chambers of Congress, which proposed "to adopt a new policy in acquiring lands from the Indians [by] provid[ing] that the lands shall be disposed of to settlers . . . , and to be paid for by the settlers, and the money to be paid to the Indians only as it is received . . . from the settlers." [12] The Senate bill, S. 7390, passed the Senate in February, 36 Cong. Rec. 2748 (1903), but the 57th Congress expired before the House could give it consideration. In line with the changes in S. 7390, which related to the method of payment, Inspector McLaughlin was subsequently instructed to go to the Rosebud Reservation to negotiate a new

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[11] Proceedings of a Council with the Indians of Rosebud Reservation, Sept. 5, 1901, in S. Doc. No. 31, 57th Cong., 1st Sess., 12 (1901); see also Proceedings of a Council with the Indians of the Ponca Creek District, Rosebud Reservation, Apr. 13, 1901, in S. Doc. No. 31, *supra*, at 8–10.

[12] H. R. Rep. No. 3839, 57th Cong., 2d Sess., 1–2 (1903) (to accompany H. R. 17467); S. Rep. No. 3271, 57th Cong., 2d Sess., 2 (1903) (to accompany S. 7390).

agreement.[13] He explained to the Rosebud Tribe: "I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment .... You will still have as large a reservation as Pine Ridge after this is cut off." [14]

Inspector McLaughlin failed to get three-fourths of the adult male Indians to consent to this new method of payment, although he did obtain the consent of a majority, provided that the price to homesteaders be raised from $2.50 to $2.75 per acre. Agreement of Aug. 10, 1903.[15] How-

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[13] Letter from the Commissioner of Indian Affairs to James McLaughlin, U. S. Indian Inspector, June 30, 1903, App. 461–462:

"In a joint request to the Department dated April 4, 1903, the members of the South Dakota delegation in Congress . . . asked that an Inspector be detailed to proceed to the Rosebud Indian reservation, in South Dakota, for the purpose of negotiating a new agreement with the Indians thereof for the cession of the unallotted portion of their reserve embraced in Gregory County, along the lines proposed in Senate Bill No. 7390 . . . .

"The essential features of said S. 7390, with which you are already familiar, are as follows:

"(1) That instead of paying the Indians the lump sum of $1,040,000 for the surplus Gregory County lands as provided in the agreement of September 14, 1901, the lands be disposed of to settlers under the provisions of the homestead and town-site laws, excepting sections 16 and 36 or the equivalent thereof, at not less than $2.50 per acre, the proceeds arising from such sale to be paid to the Indians."

In light of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), the House and Senate Committees understood that consent of the Indians to the change was not mandatory, but "in view of the [1868] treaty stipulation . . . it would be better to require the treaty as amended to be accepted by the Indians before it becomes effective." H. R. Rep. No. 3839, *supra*, at 2; S. Rep. No. 3271, *supra*, at 2.

[14] Minutes of Council held at Rosebud Agency, S. D., with the Sioux Indians belonging on the Rosebud Reservation 21–22 (July 30, 1903); see also *id.*, at 37 (Aug. 8, 1903); *id.*, at 50 (Aug. 10, 1903).

[15] The operative language of the new Agreement was identical to that contained in the 1901 Agreement:

"The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant,

ever, as Inspector McLaughlin had explained to the Tribe,[16] Congress understood that it was not bound by the three-fourths-consent requirement of the 1868 Treaty with the Sioux Nation. In *Lone Wolf* v. *Hitchcock*, 187 U. S., at 566, 568, this Court, dealing with the validity of a cession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent, held:

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress . . . .
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> . . . . .
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> ". . . In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."

Although Inspector McLaughlin failed to garner the signatures of three-quarters of the Indians in consent of the proposed changes, Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries.

In examining congressional intent, there is no indication

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and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County . . . ."

[16] Minutes of Council held at Rosebud Agency, S. D., with the Sioux Indians belonging on the Rosebud Reservation 21–22 (July 30, 1903); see also *id.*, at 37 (Aug. 8, 1903); *id.*, at 50 (Aug. 10, 1903).

that Congress intended to change anything other than the form of, and responsibility for, payment. In recommending ratification of the 1901 Agreement, as modified, the accompanying House Report stated:

> "The purpose of this bill is to ratify and amend an agreement made with the Rosebud Indians in South Dakota by Inspector James McLaughlin, dated September 14, 1901, providing for the cession to the United States of the unallotted portion of their lands in Gregory County, S. Dak., and opening the same to settlement and entry under the homestead and town-site laws.
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> . . . . .
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> "There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota." [17]

On the floor of the House, Congressman Burke, the 1904 Act's sponsor, in discussing the changes in the Agreement since

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[17] H. R. Rep. No. 443, 58th Cong., 2d Sess., 1, 3 (1904) (accompanying H. R. 10418). The Report, *id.*, at 4, in discussing *Lone Wolf* v. *Hitchcock*, *supra*, considered whether ratification of the amended Agreement, which had not received the approval of three-fourths of the adult male Indians, was appropriate, and concluded that it was:

"It appearing, therefore, that more than three-fourths of the male adult Indians signed the original treaty, that more than a majority were willing to sell at a less [*sic*] price than provided in this bill, and the fact that the Department recommends the passage of the measure, provided the Indians can be insured of a lump sum equal to $1,040,000, the amount mentioned in the original treaty, and the committee having fixed a price that it is believed will more than insure this amount it is thought wise and no hardship or even injustice to the Indians to have such a measure passed, and for that reason recommend the passage of the bill."

1901, made clear that the new bill was concerned only with the responsibility for payment, 38 Cong. Rec. 1423 (1904):

> "Mr. BURKE. . . . In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the Government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the Government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposing of the lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.
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> "Toward the concluding days of the last session of Congress a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the Government, disposed of to settlers under the provisions of the homestead law, the price to be fixed at $2.50 an acre, as was provided in the original treaty. . . . This bill is substantially the same as the bill which I have just referred to . . . ."

The bill itself, as introduced and passed by both Houses, incorporated the entire text of the 1903 Agreement, which itself followed the 1901 Agreement except that: (1) the Indians were not guaranteed any consideration for the land except with respect to the 16th and 36th sections (school sections), but were to be paid only as the lands were actually sold to settlers; (2) the United States did not guarantee to find purchasers but agreed only to "act as trustee for said Indians to dispose of said lands." [18] In particular, the 1904

[18] Despite this "uncertain sum" proviso, § 2 of the Act, 33 Stat. 258, suggests that Congress viewed this land as disestablished immediately:

"That all lands herein ceded and opened to settlement under this Act, remaining undisposed of at the expiration of four years from the taking

Act incorporated verbatim the language of immediate cession of the 1901 Agreement:

> "The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County . . . ." 33 Stat. 256.

As in *DeCoteau* v. *District County Court*, 420 U. S., at 445, this language is "precisely suited" to disestablishment.

Petitioner, however, objects that a "cession" requires bilateral consent, and the failure of Inspector McLaughlin to gain the approval of three-quarters of the male adult Indians vitiates any "cession." As a matter of strict English usage, petitioner is undoubtedly correct: "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (CA1 1908). Congress was simply repeating *verbatim* language from a bill ratifying the 1901 Agreement, which had made the proper use of the word "cession" because the Agreement had been approved by the Tribe. The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous as between diminution of the Reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other. The word is technically misused, but the meaning is quite clear. It was

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effect of this Act, shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one purchaser."

intended to accomplish, in 1904, precisely what it was intended to accomplish in 1901. Congress was under no misapprehension that the required portion of the Tribe had in fact approved the treaty. It knew that while a majority of the Tribe had approved it, the required extraordinary majority had not; but it had determined nonetheless to go ahead and accomplish the same result unilaterally as the Agreement would have accomplished bilaterally.[19]

The "bill provided that the lands should be ceded by the Indians to the Government . . . ." 38 Cong. Rec. 1423 (1904) (remarks of Rep. Burke). It is clear that Congress was relying on *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), in making this unilateral declaration. There is nothing in the changed method of payment, or the failure to obtain a three-quarters vote from the Indians, which indicates that the clear intent of the 1901 Agreement to diminish the Reservation boundaries had changed between 1901 and 1904.[20] The Tribe, moreover, was eventually paid for the land, *supra*, at 588 n. 3.

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[19] Congress was explicitly aware that it was acting pursuant to the holding in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903). See H. R. Rep. No. 443, *supra*, n. 17, at 3–4; 38 Cong. Rec. 2829 2832 (1904) (remarks of Rep. Burke).

[20] We noted in *DeCoteau* v. *District County Court*, 420 U. S. 425 (1975), the fact that Congress had there ratified a sale for a sum certain. These two facts—Indian consent and a sum-certain payment—aided us in determining that congressional intent was to terminate the Reservation. But, as the Court of Appeals in the instant case recognized, "[t]he determination of disestablishment . . . rests upon congressional intent, as to which the method of payment, whether lump-sum or otherwise, is but one of many factors to be considered." 521 F. 2d, at 102. *DeCoteau* rested upon precisely such a determination, and neither the sum certain nor the consent was considered dispositive one way or the other. The statutory language discussed in *DeCoteau* is similar to the language of the 1904 Act. While the 1904 Act, to be sure, lacks a sum-certain payment as well as approval by three-fourths of the adult male Indians, it, in common with *DeCoteau*, starts from the form of an agreement, which was fully explained to the Rosebud Tribe both in 1901 and in 1904. The congressional recognition

This implied continuity in purpose from 1901 to 1904 does not, however, stand alone in indicating congressional intent. Section 4 of the 1904 Act, 33 Stat. 258, provides, in pertinent part:

> "[S]ections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose . . . ."

When North and South Dakota were admitted into the Union, § 10 of the admitting Act, Act of Feb. 22, 1889, 25 Stat. 679, provided, in pertinent part:

> "[U]pon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to said States for the support of common schools . . . : *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national pur-

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"that the Agreement could not be altered," 420 U. S., at 438, was not present in this case for the simple reason that between the Sisseton-Wahpeton Agreement and the 1904 Rosebud Act, *Lone Wolf* v. *Hitchcock*, *supra*, had been decided. Nor is there any "clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms," *DeCoteau* v. *District County Court*, *supra*, at 448, as there was in *Mattz* v. *Arnett*. Finally, as is discussed, *infra*, at 603–605, as in *DeCoteau*, the State has exercised unquestioned jurisdiction over the disputed area since the passage of the enactment—an indication of the intended purpose of the Act that was not present in *Mattz* v. *Arnett*, 412 U. S., at 505. Moreover, other factors, not present in *DeCoteau*, press for a finding of disestablishment. Here, for example, unlike the situation in *DeCoteau*, we are not faced with an Act which, if it disestablished the area under question, would terminate the entire reservation, 420 U. S., at 446–447. Considered together, we feel that those disestablishment factors present in *DeCoteau* but not present here are counterbalanced by the disestablishment factors present both here and in *DeCoteau* as well as those factors present here, but not in *DeCoteau*.

> poses shall not, at any time, be subject to the grants . . . of this act, nor shall any land embraced in Indian, military, or other reservations of any character be subject to the grants . . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain."

The language of § 10 is mandatory: "nor shall" the 16th and 36th sections of lands within Indian reservations "be subject to the grants . . . until the reservation shall have been extinguished . . . ." While Congress would have had the power to establish other grants, cf. 43 U. S. C. § 856, the legislative history, in this case, demonstrates that Congress "included the provision to implement the grant in the enabling act and for no other reason." 521 F. 2d, at 101.[21] Both the House and Senate Reports explicitly noted that the "school sections" provision of what became the 1904 Act "is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act . . . ."[22] Congress, therefore, clearly thought that it was acting pursuant to § 10 of the Act of February 22, 1889, and not *sub silentio* adding an additional grant for

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[21] See, *e. g.*, 35 Cong. Rec. 3187 (1902) (remarks of Sen. Gamble): "Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain."

38 Cong. Rec. 1423 (1904):

"Mr. FINLEY. Then as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union. Mr. BURKE. Yes. Mr. FINLEY. And not otherwise? Mr. BURKE. No."

[22] H. R. Rep. No. 3839, 57th Cong., 2d Sess., 2 (1903); S. Rep. No. 3271, 57th Cong., 2d Sess., 2 (1903); H. R. Rep. No. 443, 58th Cong., 2d Sess., 2 (1904); S. Rep. No. 651, 58th Cong., 2d Sess., 2 (1904). See also n. 40, *infra*.

school lands located within a continuing reservation.[23] The far more natural construction, then, is to read a congressional intent to disestablish Gregory County from the Rosebud Reservation, thereby making the sections available for disposition to the State of South Dakota for "school sections" under § 10 of the Act of February 22, 1889.[24]

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[23] Moreover, as discussed in n. 24, *infra*, under *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902), it was a possibility that the lands in Gregory County, although disestablished from the Reservation by the 1904 Act, were not thereby converted into "public lands." Section 10 of the Act of February 22, 1889 would not, in that case, apply to the lands even though disestablished from the Reservation.

[24] Petitioner urges that the "school sections" provision indicated that Congress was not disestablishing the county, since, upon disestablishment, the sections would have automatically passed to South Dakota under § 10 of the Act of February 22, 1889. We disagree. Section 4 of the 1904 Act not only provides for the grants of the sections to the State, but also for the method and amount of payment. The section, therefore, is not superfluous. See also n. 23, *supra*.

The United States, as *amicus curiae*, argues that *Minnesota* v. *Hitchcock*, *supra*, supports the position of petitioner. *Hitchcock*, however, does not deal with the question of whether the utilization of an explicit "school sections" clause demonstrates that Congress must have intended the Reservation boundaries to have continued undiminished. Rather, the issue in *Hitchcock* was quite different: It dealt with whether *ceded* lands automatically became subject to an earlier Act's "school sections" provision. The Court concluded that "none of these ceded lands passed under the school grant to the State" because, due to a trust imposed upon them, they had a preceding status that precluded their becoming "public lands." 185 U. S., at 395, 401–402. This preceding status could exist even if the lands were disestablished from a reservation. *United States* v. *Pelican*, 232 U. S. 442, 449 (1914); cf. *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 166 (1920). As recognized by the Court of Appeals, "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." 521 F. 2d, at 102. The question of whether lands become "public lands" under *Hitchcock* and *Ash Sheep*, is therefore, logically separate from a question of disestablishment. *United States* v. *Pelican*, *supra*. As the issue is not before us, we need not decide whether or not the lands became "public lands."

That it was clearly understood, at least by the Executive Branch, that the 1904 Act, like the 1901 Agreement, contemplated a diminution of the Reservation, is apparent from the Rosebud Proclamation of May 13, 1904, 33 Stat. 2354. In accordance with the requirement of § 2 of the 1904 Act that the land would "be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry," the Proclamation stated, in pertinent part:

> "Whereas by an agreement between the Sioux tribe of Indians on the Rosebud Reservation, in the State of South Dakota, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress . . . *the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever,* expressed or implied, unto the United States of America, *all their claim, title, and interest of every kind and character* in and to the unallotted lands embraced in the following described tract of country now in the State of South Dakota, . . .
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> . . . . . .
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> "NOW, THEREFORE, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Sioux tribe of Indians of the Rosebud Reservation . . . will, on the eighth day of August, 1904, at 9 o'clock a. m., in the manner herein prescribed and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States." (Emphasis supplied.)

The opening portion of the Proclamation is an unambiguous, contemporaneous, statement, by the Nation's Chief Executive,

of a perceived disestablishment of Gregory County. It reflects, we believe, the clear import of the congressional action in the 1904 Act.

In sum, an examination of the process leading up to the enactment of the 1904 Act, as well as the language and legislative history, leads us, as it led the Court of Appeals and the District Court, to the firm conclusion that congressional intent was to exclude Gregory County from the Rosebud Reservation.[25]

Although the subsequent "jurisdictional history," *DeCoteau* v. *District County Court*, 420 U. S., at 442, is not entirely clear, the single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands in Gregory County since the passage of the 1904 Act, see 375 F. Supp., at 1084; Amended Complaint ¶ 21.[26] Since state

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[25] As noted by the Court of Appeals, 521 F. 2d, at 102 n. 54:

"Congressional action with reference to Gregory County shortly after the passage of the 1904 Act also confirms the conclusions. By the Act of February 7, 1905, ch. 545, 33 Stat. 700, Congress granted settlers an extension of time in which to establish their residence upon the opened Gregory County lands. The title and the body of the Act contain the following language:

'lands which were *heretofore* a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota.'

"33 Stat. 700 (Emphasis added). See S. Rep. No. 2760, 58th Cong., 3d Sess., 1 (1905); H. R. Rep. No. 4198, 58th Cong., 3d Sess., 1 (1905); 39 Cong. Rec. 1578 (1905) (remarks of Sen. Gamble)."

The 1905 Act, passed a short time after the 1904 Act by the same Congress, and dealing with the same subject matter, is additional evidence of the congressional intent to disestablish Gregory County from the Rosebud Reservation in the 1904 Act. There are, moreover, references in the legislative history of the 1907 and 1910 Acts, discussed, *infra*, at 608, 609, and nn. 38, 39, and at 611, 612, which reinforce the conclusion that Congress, in 1904, disestablished Gregory County.

[26] See also *State* v. *White Horse*, — S. D. —, 231 N. W. 2d 847 (1975). This factor, of course, applies with equal force to the counties affected by the 1907 Act and by the 1910 Act, *infra*, at 605–615.

jurisdiction over the area within a reservation's boundaries is quite limited, 18 U. S. C. § 1151; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); *Williams* v. *Lee*, 358 U. S. 217 (1959); *Worcester* v. *Georgia*, 6 Pet. 515 (1832), the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the "jurisdictional history." [27] The long-

[27] As already noted, the District Court found that "[f]rom the time these acts were passed, these [four] counties have been treated as outside the Rosebud Sioux Reservation by the settlers, their descendants, the State of South Dakota and the federal courts." 375 F. Supp., at 1084. This factual finding is unchallenged. Both parties rely on other post-Act indicia of jurisdictional assumption, but they are, at best, confusing and unenlightening. The Indian Reorganization Act of 1934, 48 Stat. 984, and the Department of Interior's reaction thereto, urged perhaps most fervently by the United States as *amicus curiae*, fail to establish with anything like clarity the view of Congress, or the Department of the Interior, in the 1930's, with respect to land affected by such Acts as the 1904 Act involved herein. Under § 3 of the Indian Reorganization Act, the Secretary of the Interior was authorized "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened . . . ." 48 Stat. 984. Under § 8, however, it was stated that "[n]othing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing . . . ." 48 Stat. 986. Section 8, relied heavily upon by the United States in its *amicus* brief, on its face refers to nothing more than "*Indian* holdings of allotments or homesteads" outside the boundaries of a reservation. This comports with the definition of "Indian country" in 18 U. S. C. § 1151. In any case, no clear view on the part of the relevant agencies that land opened up under uncertain-sum agreements remained reservation land exists. Compare Interior Department Opinion, 54 I. D. 559, 560 (1934), with Opinion of Acting Solicitor, 56 I. D. 330, 333 (1938). As was observed, n. 24, *supra*, the question of whether lands became public lands is separate from the question of intent to disestablish boundaries. The relevant materials presented with respect to the Indian Reorganization Act of 1934 simply do not present any clear treatment of the scope of the Rosebud Reservation, and hence are of minimal utility in our examination. Nor do we have a history of "repeated

standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.[28] We are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.

III

Having determined that the 1904 Act carried forth the intent to disestablish which was unquestionably manifested in the 1901 Agreement, our examination of the 1907 and the

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recognition of the reservation status of the land after [the 1904 Act] by the Department of the Interior and by Congress." *Mattz* v. *Arnett*, 412 U. S., at 505. The material presented by the parties reveals no consistent, or even dominant, approach to the territory in question. In light of the clear assumption of jurisdiction over the past 70 years by the State of South Dakota of the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory, history of congressional and administrative actions in other respects carries but little force.

[28] Cf. *Massachusetts* v. *New York*, 271 U. S. 65, 87, 94 (1926); *Martin* v. *Waddell*, 16 Pet. 367, 411–412, 414, 418 (1842). A showing of long-standing assumption of jurisdiction is, in the related area of state boundary disputes, entitled to considerable weight. See *Rhode Island* v. *Massachusetts*, 4 How. 591, 636 (1846); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53–54 (1906); *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926); *Massachusetts* v. *New York*, *supra*, at 95; *Arkansas* v. *Tennessee*, 310 U. S. 563, 569 (1940). In *United States* v. *Stone*, 2 Wall. 525, 537 (1865), involving a boundary between the Delaware Indian Reservation and land set aside for a United States Government military post, this Court stated: "In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years, could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case . . . ."

1910 Acts is made easier. None of the parties really disputes that the intent of the three Acts was the same.[29] Because the later Acts do vary in some respects, however, we shall explain briefly why we find a continuity of intent through the 1907 and the 1910 Acts.[30]

The "familiar forces" at work pressing for the opening of Indian lands did not cease with the cession of Gregory County. By late 1906, Congressman Burke was preparing a bill dealing with the "sale of that part of the reservation located in Tripp County." [31] Inspector McLaughlin was instructed to proceed to the Rosebud Reservation to negotiate an agreement for land in Tripp County which when "ceded should be disposed of under the general provisions of the homestead and townsite laws of the United States," and he was given suggested terms, "similar to those in the disposal

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[29] While, of course, urging that there was no congressional intent to disestablish, petitioner asserts that "[t]he substance of all three statutes is the same, as is much of the language." Brief for Petitioner 40. And again, *id.*, at 41:

"The 1904 Act differs in format from the 1907 and 1910 Acts but not in substance. . . . As a result of these and other substantive changes [between the 1901 Agreement and the 1904 Act], the 1904 Act, in legal effect, as well as language, is the same as the 1907 and 1910 Acts. In all three statutes, the land was opened for sale to settlers with the proceeds credited to the Indians only as received."

[30] The dissenters feel that the 1907 and 1910 Acts "are far simpler for present purposes" since "[t]hey contain neither words of cession nor words of termination." *Post*, at 620. But the dissenters also recognize, as did the parties, that the 1904 Act is "properly regard[ed] as the crucial Act . . . ." *Post*, at 626. The 1907 and the 1910 Acts must be considered in context, and an important part of that context is the 1901 Agreement and the 1904 Act.

[31] Reference to letter of Nov. 22, 1906, from Rep. Burke to the Department of the Interior, Office of Indian Affairs, in letter of Dec. 5, 1906, from Commissioner F. E. Leupp, to Inspector James McLaughlin. Bills were introduced in December 1906, 41 Cong. Rec. 15 (1906) (Burke bill, H. R. 20547); *id.*, at 50–51 (Gamble bill, S. 6618).

of the ceded lands in Gregory County . . . ." [32] Inspector McLaughlin's negotiations produced virtually the same result as in 1904. A 1907 Agreement, signed by a majority, but not by three-fourths, of the adult male Indians, provided that the Indians "do hereby cede, grant, and relinquish to the United States all claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation [in Tripp and Lyman Counties], except such portions thereof as have been, or may hereafter be, allotted to Indians." [33] The Secretary of the Interior recommended that Congress ratify the Agreement, Letter from E. A. Hitchcock, *supra*, n. 33, and the Senate Committee on Indian Affairs reported a ratification bill out, S. Rep. No. 6831, 59th Cong., 2d Sess. (1907). By this time, however, the House had already passed a second bill introduced by Congressman Burke which did not incorporate the Agreement, 41 Cong. Rec. 3103–3105 (1907) (H. R. 24987), although it did substantially incorporate the terms of the Agreement, as noted by Congressman Burke, *id.*, at 3104:

> "The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by [a majority]. . . . It is along the line of the bill which passed in the Fifty-eighth Congress for the sale of that portion of this same reservation that is located in Gregory County.

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[32] Letter of Dec. 5, 1906, from Commissioner F. E. Leupp, *supra*. Inspector McLaughlin was told that it was "but right to the Indians also that you should explain to them" that *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), "vests in Congress the right to open their lands without their consent; that the desire of the Department in sending you to talk the matter over with the Indians is to obtain from them their views of the terms on which the opening ought to be made . . . ."

[33] Letter from E. A. Hitchcock, Secretary of the Interior, to the Chairman, Committee on Indian Affairs, House of Representatives, Feb. 14, 1907 (enclosing Agreement), in H. R. Rep. No. 7613, 59th Cong., 2d Sess., 4 (1907).

". . . They will have left, after this land is disposed of, a reservation that is substantially 50 miles square . . . ." [34]

The operative language of the bill, subsequently passed by the Senate without debate, and enacted into law, 34 Stat. 1230, provided:

"[T]he Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota [in Tripp and Lyman Counties], except such portions thereof as have been, or may hereafter be, allotted to Indians . . . ."

As the parties recognize, the substance of the 1907 Act is identical to the 1904 Act. Section 2 provides for the disposition of lands under the "general provisions of the homestead and town-site laws," while § 3 specifies land purchase prices, with the proviso that "any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price." [35] Section 6 provides for the purchase by the United States of sections 16 and 36 of the lands in each township and their transfer to South Dakota for "the use of the common schools." [36] Sections 5 and 7 provide that the United States is to act as trustee for the Indians to dispose of the lands and to collect and dispense the proceeds.[37]

In virtually all respects, then, except for the operative language in § 1 replacing the Agreement language, the 1907

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[34] In response to a question which inquired whether "the provisions of the treaty [have] been inserted in this bill," Congressman Burke replied: "I may say to the gentleman that they have been." 41 Cong. Rec. 3104 (1907).

[35] See the discussion, n. 18, *supra*, of the 1904 Act's comparable provision.

[36] The discussion, *supra*, at 599–601, with respect to the "school sections" provision of the 1904 Act, applies equally here.

[37] This, too, is substantively identical to the 1904 Act, *supra*, at 596.

Act is a functional twin of the 1904 Act. And, as the legislative comments make clear, *supra*, at 607–608, the change in § 1 language was not intended to modify or change the purposes or operation of the 1904 Act.[38] We agree with the Court of Appeals' conclusion, 521 F. 2d, at 104:

> "Nothing in the language of the 1907 Act or in the surrounding circumstances and legislative history indicates a change in that congressional determination to alter the reservation boundaries which we have found in the 1904 Act."

The 1907 Act, like the 1904 Act which preceded it, disestablished the land in Tripp and Lyman Counties from the Rosebud Reservation.

The pressures for more land had not yet expended themselves with the passage of the 1907 Act. In late 1908, Senator Gamble submitted a new bill authorizing the sale and disposition of a portion of the surplus and unallotted lands in Mellette County and in a strip located in the eastern part of Todd County, S. 7379, 43 Cong. Rec. 65 (1908). The accompanying Senate Report noted, in proposing the opening to settlement of an area comprising about 900,000 acres, that "[t]he *present area* of the Rosebud Indian Reservation aggregates 1,800,000 acres." S. Rep. No. 887, 60th Cong., 2d Sess., 1 (1909) (emphasis supplied).[39] The school-sections

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[38] In one particular, the language of the 1907 Act reinforces our conclusion with respect to the 1904 Act. The 1907 Act, 34 Stat. 1230, was to open "all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian . . . ." This description would encompass Gregory County as well as Tripp County, unless the 1904 Act had disestablished Gregory County from the Reservation. See H. R. Rep. No. 7613, 59th Cong., 2d Sess., 1 (1907) (the bill "affects all that portion of the reservation east of range 25 of the fifth principal meridian south of the Big White River . . ."); S. Rep. No. 6838, 59th Cong., 2d Sess., 1 (1907).

[39] Mellette and Todd Counties, the two counties unaffected by the 1904 and 1907 Acts, compose approximately 1.8 million acres, whereas the

provision was again included in the bill, "to be paid for by the Government in conformity with the provisions of the act admitting the State of South Dakota into the Union." *Id.*, at 2.[40] Senator Gamble was unable to have the Senate consider the bill before the term of Congress expired, and Inspector McLaughlin was once again dispatched to conduct negotiations with the Rosebud Tribe concerning the Gamble bill.[41] This time, he did not seek to negotiate an agreement with the Indians, but reported back to the Secretary of the Interior the "practically unanimous" concurrence of the Indians "in the opening of the northern strip, provided the two

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original (1889) Reservation encompassed somewhat over 3.2 million acres. A letter, dated January 26, 1909, from James Garfield, Secretary of the Interior, to Senator Gamble, S. Rep. No. 887, 60th Cong., 2d Sess., 3 (1909), clearly noted the perceived disestablishment of major portions of the Rosebud Reservation by the prior two Acts:

"The Rosebud Reservation has been reduced very rapidly during the last few years, and intimations have reached this department from trustworthy sources that there is danger that the land available for allotment may be exhausted if too large a reduction is made at this time. I do not believe, therefore, that the strip of land on the east of the present diminished reservation should be opened yet."

[40] See also 45 Cong. Rec. 1068 (1910) (colloquy between Sen. Gamble and Sen. Crawford):

"MR. GAMBLE. . . . [T]he Government agreed to reserve these lands and to pay for them, not only by law, but under the enabling act admitting the State of South Dakota to the Federal Union.

. . . . .

"MR. CRAWFORD. Sections 16 and 36, to which the Senator refers, are held from the settler and are given to the State to keep good the pledge made to the State by the Government under the enabling act when the State was admitted into the Union . . . ."

[41] The Secretary of the Interior believed that "the views of the Indians should be procured before the bill is finally acted on," although recognizing "the fact that Congress can enact legislation of this character without the consent of the Indians interested . . . ." Letter dated Jan. 26, 1909, from James Garfield, Secretary of the Interior, to Sen. Gamble, in S. Rep. No. 887, *supra*, at 3.

tiers of townships in the eastern part of Meyer [*sic*] County remain a part of the diminished reservation." [42]

New bills were introduced similar in purpose to the original Gamble bill.[43] The Secretary of the Interior recommended to Congress that the bill open only Mellette County, and not the eastern part of Todd County, and that the bill also include a provision subjecting the land to be opened "for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country." [44] These changes were made in S. 183, see S. Rep. No. 68, 61st Cong., 2d Sess. (1910). The Report noted, *id.*, at 2–4:

> "The present area of the Rosebud Indian Reservation aggregates about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of about 830,000 acres. . . .
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> . . . . .
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> ". . . . It also provides that the Secretary of the Interior, in his discretion, may permit Indians who have allotments within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished.
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> "Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government in conformity with the pro-

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[42] Letter dated Apr. 29, 1909, from James McLaughlin to the Secretary of the Interior. For the negotiations with the Indians, see Transcript of Council held at Rosebud Agency, Mar. 11, 1909; Proceedings of Council held with the Indians of the Rosebud Reservation, Apr. 21 and 26, 1909.

[43] See 44 Cong. Rec. 132 (1909) (S. 183); *id.*, at 2013 (H. R. 9544); 45 Cong. Rec. 10 (1909) (H. R. 12437).

[44] Letter dated Jan. 13, 1910, from R. A. Ballinger, Secretary of the Interior, to Sen. Clapp. S. Rep. No. 68, at 5.

> visions of the act admitting the State of South Dakota into the Union. . . .
>
> . . . . .
>
> "Although Congress has full power to enact legislation of this character without the consent of the Indians, it was felt the Indians should be fully advised as to the provisions of the pending measure and their views should be asked in regard thereto."

The bill was passed by the Senate on January 17, 1910, 45 Cong. Rec. 1065–1066, 1075 (1910), and the House Committee on Indian Affairs decided to adopt the Senate bill, its Report noting:

> "The Rosebud Indian Reservation when set aside as a separate reservation under the Sioux act of 1889 contained something over 3,000,000 acres of land. [Then follows a description of the 1904 Act and the 1907 Act, observing that the 1907 Act was "substantially in the same form as the bill now under consideration . . . ."]
>
> "The area comprised in the present bill is about 800,000 acres . . . . *There will still be left a reservation containing about 1,000,000 acres,* and as the Indians have all been allotted *there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of.*" [45]

The bill then passed the House with amendments, *id.*, at 5473, and, after conference to reconcile differences in the House and Senate bills not material here, the bill became law on May 30, 1910.[46]

The 1910 Act is substantially similar to the 1907 Act, and

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[45] H. R. Rep. No. 332, 61st Cong., 2d Sess., 2 (1910) (accompanying H. R. 12437) (emphasis supplied).

[46] Act of May 30, 1910, c. 260, 36 Stat. 448; 45 Cong. Rec. 6437 (1910) (Conference Report passes House); *id.*, at 6326 (Conference Report passes Senate).

uses identical operative language authorizing and directing the Secretary of the Interior "to sell and dispose of all that portion of the Rosebud Indian Reservation [in present day Mellette County] except such portions thereof as have been or may be hereafter allotted to Indians . . . ." 36 Stat. 448. Because of the substantive similarity of the Acts, no useful purpose would be served in recounting the similar provisions contained in the 1910 Act. Two new provisions, however, do warrant mention. The first is a proviso in § 1, stating:

> "[A]ny Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation."

This proviso, on its face, is a strong indication of the continuing intent to disestablish the affected areas, first manifested in the 1901 Agreement. The second is the provision in § 10 of the 1910 Act, included at the suggestion of the Secretary of the Interior, subjecting the opened land "for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country." As there existed, in 1910, an outstanding prohibition against the introduction of intoxicants into "Indian country," see Act of July 23, 1892, 27 Stat. 260, the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the Reservation.[47]

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[47] See *id.*, at 5464 (colloquy between Rep. Bartholdt and Rep. Butler):

"MR. BARTHOLDT. But if the lands are allotted it is no longer an Indian reservation.

"MR. BUTLER. If the lands are allotted, it will be no longer an Indian reservation. . . . It is where, as I understand, the Indian has

These added provisions, as well as the clear legislative history of the 1910 Act, reflect strongly the continued intent to diminish the Reservation boundaries. We conclude that

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always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood."

Under *Dick* v. *United States*, 208 U. S. 340, 359 (1908), Congress was entitled to attach liquor prohibitions, reasonable in duration, on non-Indian land which Indians were likely to frequent. Congress explicitly was adding this provision under the authority of *Dick*. See Letter dated Jan. 13, 1910, from R. A. Ballinger, Secretary of the Interior, to Rep. Burke.

The petitioner, as well as the United States, as *amicus curiae*, relies on *In re Heff*, 197 U. S. 488 (1905). As suggested by the United States, Brief for United States as *Amicus Curiae* 40 n. 28:

"Although the courts below suggested that the provision would be unnecessary if the Reservation were continued . . . , that suggestion is erroneous. As the debates show, 45 Cong. Rec. 5460–5464 (1910), members of Congress were fully aware of this Court's decision in *In re Heff*, 197 U. S. 488, holding that Indian allottees were subject to *state* liquor laws."

This reliance is misplaced. *Heff* did not deal with the question of the sale of liquor to Indian allottees on a reservation where liquor was forbidden by the Act of July 23, 1892, 27 Stat. 260. Rather, *Heff* dealt with the sale of liquor to Indian allottees under the Act of January 30, 1897, 29 Stat. 506, which prohibited the sale of liquor (without restriction on location) to Indians. *Heff*, in short, dealt with an Act which prohibited the sale of liquor, anywhere, based on the *status* of a person, while the prohibition of sales on Indian country under the 1892 Act applied to *areas*, regardless of the status of the person. (Insofar as is relevant, the 1892 Act states that no "intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country.") This distinction was recognized in *Dick* v. *United States*, *supra*, at 352, which, noting *In re Heff*, observed that the Indians involved in *Dick* were citizens of the United States, but then went on to discuss the "Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country." Thus, under the 1892 Act, as recognized in *Dick*, liquor was flatly prohibited from introduction into the Indian country, a prohibition which prevented sale to *all* persons. Indian country, however, did not apply to territory on which "the Indian title had been extinguished, and over which and over the inhabitants of which . . . the jurisdiction of the State . . .

the 1910 Act continued the policies of the prior two Acts, and Mellette County was thereby detached from the Reservation.

IV

The intent of Congress in the 1904, the 1907, and the 1910 Acts was to change the boundaries of the original 1889 Rosebud Reservation. Much has changed since then, and if Congress had it to do over again it might well have chosen a different course. But, as we observed in *DeCoteau* v. *District County Court*, 420 U. S., at 449: "[O]ur task here is a narrow one. . . . [W]e cannot remake history." [48]

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

The Court holds today that in 1904, 1907, and 1910, Congress broke solemn promises it had made to the Rosebud

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was full and complete." *Dick* v. *United States*, *supra*, at 352. Land remaining within the boundaries of a reservation, of course, would not be subject to the "full and complete" jurisdiction of the State. See *Williams* v. *Lee*, 358 U. S. 217, 223 (1959). While, prior to the statutory definition in 18 U. S. C. § 1151, the defined areas of Indian country may have been a bit vague, see *Seymour* v. *Superintendent*, 368 U. S. 351, 357 (1962), *Dick* was the most recent pronouncement on the subject at the time of the 1910 Act, and clearly defined Indian country with reference to state jurisdiction. See *United States* v. *Pelican*, 232 U. S. 442, 449 (1914); *Perrin* v. *United States*, 232 U. S. 478, 482 (1914) (discussing the congressional power "to prohibit the introduction of intoxicating liquors into an Indian reservation . . ."); cf. *United States* v. *Mazurie*, 419 U. S. 544, 554–555 (1975). The liquor provision in § 10 of the 1910 Act, accordingly, is a strong indication that Congress did not view the affected areas as "Indian country," but, rather, as disestablished from the Reservation.

[48] The dissent speculates expansively on the possible adverse consequences of today's decision, *post*, at 630–633. Most, if not all, of these consequences involve issues not presented by this case. To the extent that members of the Rosebud Tribe are living on allotted land outside of the Reservation, they, too, are on "Indian country," within the definition of 18 U. S. C. § 1151, and hence subject to federal provisions and protections. Our decision in *Morton* v. *Ruiz*, 415 U. S. 199 (1974), moreover, that fed-

Sioux Tribe and took from them, without any guarantee of compensation, three-quarters of their reservation. Although it was suggested at argument, Tr. of Oral Arg. 18–20, that the only consequence of such a holding would be to preclude the Tribe from continuing to exercise the jurisdiction granted to it by its approved constitution and bylaws,[1] in fact much more is at stake. This case involves not just the rights of the Tribe, but also the rights of approximately 2,000 Indians living in the disputed area, and the right of the United States to continue to administer the disputed area as part of the Rosebud Reservation.[2] See Part IV, *infra*. In addition, the

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eral benefits and programs shall be made available to tribal members living "on or near" the reservation, surely diminishes the specter of a "sharp reduction in the federal aid available to members of the Rosebud Tribe living off the reservation." *Post*, at 631. Certainly, that effect is much less clear than it would have been in *DeCoteau* v. *District County Court*, where the entire reservation was extinguished. The combined effect of 18 U. S. C. § 1151 and *Morton* v. *Ruiz*, *supra*, is that many of the dissent's parade of horribles are nothing more than just that.

[1] The constitution of the Rosebud Sioux Tribe, approved by the Secretary of the Interior in 1935, App. 1396–1397, states in Art. I that "[t]he jurisdiction of the Rosebud Sioux Tribe . . . shall extend to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889 . . . ."

There is some confusion in the record concerning the jurisdictional history of the disputed area. At the conclusion of his lengthy opinion, the District Judge stated that "the State of South Dakota has treated the [disputed] counties . . . as portions of the state over which the State of South Dakota can exercise jurisdiction since the passage of [the] acts." 375 F. Supp. 1065, 1083 (SD 1974). But contrary to the Court's suggestion, *ante*, at 604–605, n. 27, this statement is hotly disputed insofar as it implies that the Tribe has conceded jurisdiction. The Tribe claims it "has consistently exercised jurisdiction over Indians on all parts of the reservation." Reply Brief for Petitioner 2b. The United States agrees, Brief for United States as *Amicus Curiae* 32 n. 22, and has provided a number of examples, *id.*, at 23a–32a.

[2] The United States reports that it has treated the disputed areas as part of the Reservation, and that it maintains or funds child-welfare

ramifications of today's decision may extend to a large number of other reservations throughout the Nation. See *ibid.* I therefore feel constrained to explain at length why the decision is, in my view, wholly unjustifiable.

Until today, the effect on reservation boundaries of Acts disposing of surplus reservation land was well settled. The general rule, entitled to "the broadest possible scope," is that in interpreting these Acts "legal ambiguities are resolved to the benefit of the Indians." *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975). Congressional intent therefore must be "clear" before this Court will find that a reservation established by Congress (or the Executive) was disestablished. *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973). Applying these principles, the Court has found disestablishment when Congress ratified a treaty by which Indians agreed to sell all interest in part or all of a reservation, *DeCoteau* v. *District County Court*, *supra*, or when Congress employed express words of termination, *Mattz* v. *Arnett*, *supra*, at 504 n. 22 (dictum). But when, as here, Congress merely "opened" a reservation—that is, made reservation lands available to non-Indians and acted as a sales agent on behalf of the Indians—the reservation boundaries have been held to be unaffected. *Mattz* v. *Arnett*, *supra*; *Seymour* v. *Superintendent*, 368 U. S. 351 (1962). In *DeCoteau*, the Court clearly distinguished the two situations, observing:

> "[A purchase-and-sale Act] is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. [It] does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain . . . in payment for the express cession and relinquishment of 'all' of the

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programs, burial assistance, outpatient clinics, and housing in these areas. *Id.*, at 37–38. See also Letter from the Acting Area Director, Aberdeen, S. D., Bureau of Indian Affairs, to Neil Proto, Dept. of Justice, Aug. 23, 1974, App. 1405–1409, detailing these services.

> tribe's 'claim, right, title, and interest,' in the unallotted lands. The statute in *Mattz*, by contrast, benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers." 420 U. S., at 448.

Today, however, the Court obliterates this distinction, and, by holding against the Tribe when the evidence concerning congressional intent is palpably ambiguous, erodes the general principles for interpreting Indian statutes.

I

What is perhaps most striking about the Rosebud Acts, in light of the interpretation the Court places upon them, is the absence of any express provision disestablishing the Reservation. As we observed in *Mattz:* "Congress has used clear language of express termination when that result is desired." 412 U. S., at 504 n. 22. We cited three examples in *Mattz*: 15 Stat. 221, which stated that "the Smith River reservation is hereby discontinued"; 27 Stat. 63, which stated that "a portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain"; and 33 Stat. 218, enacted just two days before the first of the Rosebud Acts, which stated that "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations . . . are hereby abolished." The very Act that created the Rosebud Reservation provides yet another example, for in that Act Congress expressly "restored to the public domain" part of the Great Sioux Reservation. Act of Mar. 2, 1889, § 21, 25 Stat. 896. And other examples abound.[3]

The Acts in question contain no similar language. The Act of April 23, 1904, 33 Stat. 254, is a peculiarly drafted statute. In substance, it is no different from the

[3] The National Indian Law Library's compilation of Allotment/Cession Statutes, Doc. No. 002279, contains 11 additional examples, taken from statutes enacted between 1888–1913.

statutes considered in *Mattz* and *Seymour;* it opens lands on the Reservation to white settlers, guarantees to the Indians the proceeds from the sale of the lands, but does not commit the United States to purchasing the land.[4] In form, however, the Act "amended and modified" and then "ratified" the 1901 Agreement between Inspector McLaughlin and the Rosebud Sioux in which the Tribe agreed to sell the lands in question to the United States for a lump sum; this Agreement had been rejected by the Congress in 1902. The "amendments" which Congress *unilaterally* inserted obviously were substantial, since they transformed the transaction from a *DeCoteau*-type purchase to a *Mattz*-type "opening." But because the ratification format was used, the 1904 Act contains language from the 1901 Agreement which provided that the "Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" in the unallotted lands in Gregory County.

In *DeCoteau* we stated that this language, when contained in an agreement approved by the Indians and ratified by Congress, is "precisely suited," 420 U. S., at 445, to terminating a reservation. But I cannot agree with the Court, *ante,* at 597, that the language is equally well suited to disestablish the Reservation here. Its usage may simply mean that Congress found that working from an earlier document—in this case the 1901 Agreement—was easier than drafting a new law. Whereas in *DeCoteau* the key phrase expressed the Indians' understanding of what they were surrendering and the Government's understanding of what it was acquiring, here the Indians had not agreed to this transaction and the Government disclaimed any intent to purchase anything other than school

[4] The United States did agree, in § 4 of the Act, to purchase sections 16 and 36 of Gregory County and to grant these sections to the State for school purposes. The significance of this grant is discussed in n. 12, *infra.*

lands, see n. 4, *supra*. Indeed, as the Court concedes, *ante*, at 597, as a matter of English usage the words "cede, surrender, grant, and convey," make no sense in the context of an "agreement" to which the seller has not assented. Thus the Court ultimately rests its decision on an asserted ability to "'see what [Congress is] driving at,'" even though Congress has "'not said it.'" *Ibid.*

The 1907 and 1910 Acts are far simpler for present purposes. They contain neither words of cession nor words of termination. They simply "authorized and directed" the Secretary of the Interior "to sell or dispose of" the specified lands "under the general provisions of the homestead and town-site laws of the United States." Act of Mar. 2, 1907, §§ 1, 2, 34 Stat. 1230; Act of May 30, 1910, §§ 1, 2, c. 260, 36 Stat. 448. These statutes are virtually identical to the law construed in *Seymour* v. *Superintendent*, which also "authorized and directed" the Secretary "to sell or dispose of" specified lands "under the provisions of the homestead laws." Act of Mar. 22, 1906, §§ 1, 3, c. 1126, 34 Stat. 80–81. They are quite similar to the Act at issue in *Mattz* which "declared" specified lands "to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands." Act of June 17, 1892, 27 Stat. 52. They bear no resemblance, however, to the statutes cited in *Mattz* as examples of "clear language of express termination."

II

Since congressional intent must be unambiguous before we can conclude that Congress terminated part of an Indian reservation, the absence of any express provision to this effect in the Rosebud Acts strongly militates against the interpretation the Court places on those Acts. But I need not rely on congressional silence alone—eloquent as it may be—to reject the Court's interpretation. For both the text of the

Acts and the circumstances surrounding their enactment affirmatively point to the opposite conclusion.

A

The text of the Acts provides numerous indications that Congress did not intend to remove the opened areas from the Reservation. First, the Acts granted the Indians a variety of rights in those areas. All three Acts, for example, permitted Indians with allotments in the counties to be opened to retain their allotments,[5] and the 1907 and 1910 Acts also allowed certain Indians without allotments in these counties to secure allotments there.[6] All three Acts also granted the Indians a beneficial interest in all the opened lands, since the Acts simply made the United States "trustee for [the] Indians to dispose of said lands."[7] And the 1904 and 1910

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[5] 1904 Act, § 1, Art. I; 1907 Act, § 1; 1910 Act, § 1.

[6] The 1907 Act provided in § 2 that before opening the lands the Secretary of the Interior "may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, and he shall also allot one hundred and sixty acres of land to each child . . . belonging on the Rosebud Reservation who has not heretofore received an allotment." The fact that these allotments were to be made before the county was opened to settlers indicates that they could be taken from the lands to be opened. See also H. R. Rep. No. 7613, 59th Cong., 2d Sess., 3 (1907) ("The bill further provides that . . . the Indians within the reservation may relinquish allotments and select allotments in any other portion of the reservation, *including the tract affected by this bill*"). (Emphasis added.) The 1910 Act is even clearer in this regard; it excludes from the opened county lands that "have been *or may be hereafter* allotted to Indians." (Emphasis added.)

Significantly, the 1901 Agreement which, if ratified, would have partially terminated the Reservation, did not contain any provision for new or in-lieu allotments in the tract to be ceded.

[7] 1904 Act, § 6; 1907 Act, § 8; 1910 Act, § 11. See also *United States* v. *Brindle*, 110 U. S. 688, 693 (1884). Although as the Court notes, *ante*, at 596–597, n. 18, Congress did attempt to assure that the beneficial interest eventually would be extinguished, the Acts contain no guarantee. Indeed,

Acts authorized the Executive, before opening the counties to settlers, to reserve some lands for Indian schools, religious missions, and service agencies.[8] Of course, it is possible that Congress intended to remove the opened counties from the Reservation while leaving the Indians with a host of rights in the counties. But this interpretation of the statutes is surely strained, especially since nothing in the legislative history indicates that such an anomalous result was desired. Thus, it is far more sensible to view these grants to the Indians as evidence that Congress did not intend to terminate the Reservation immediately.

This interpretation is supported by other provisions in the Acts as well. In the 1907 and 1910 Acts, for example, Congress directed that payments received from sale of the lands to be opened were to be deposited "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation."[9] If the Rosebud Acts also removed the opened counties from the Reservation, then the members of the Tribe living in Gregory County, opened in 1904, were not entitled to share in the proceeds of the 1907 or 1910 sales, and the members of the Tribe living in Tripp County, opened by the Act of 1907, were not entitled to the 1910 proceeds at the very least.[10] Again, it is possible that Congress intended

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the Indians retained an interest in 4,600 acres until 1938 when these lands were restored to the Tribe.

[8] 1904 Act, § 2; 1910 Act, § 1 (second proviso). The 1910 Act in § 1 also reserved timberland to the Indians, although there was a dispute in Congress as to whether any such land existed. Compare 45 Cong. Rec. 5471 (1910) (remarks of Rep. Burke) with S. Rep. No. 68, 61st Cong., 2d Sess., 3 (1910). The provision in the 1904 Act reserving these lands was not contained in the original Agreement.

[9] 1907 Act, § 5; 1910 Act, § 7.

[10] If the Rosebud Acts disestablished the Reservation, then arguably the Indians in Tripp County were not entitled to share in the 1907 proceeds either. By the time those proceeds were deposited "to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation," Tripp County had already been opened—and therefore, under the Court's

this result. But, absent contrary evidence, it is far more reasonable to assume that Congress meant for all members of the Tribe living on the original Reservation to profit from the sales, since prior to the Rosebud Acts they all had equal rights in the opened lands. Thus, the manner in which Congress defined the class of beneficiaries in the 1907 and 1910 Acts indicates that Congress believed that the Indians living in the opened counties still "belonged" to the Reservation after the lands were opened.

Finally, all the statutes contain an important guide to interpretation that the Court ignores. Each Act states, in almost identical terms, that "nothing in this 'agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.' "[11] These provisions constitute clear congressional commands to interpret the Rosebud Acts so as to minimize conflicts with the Treaty of 1889. Yet the Court ignores these provisions and maximizes the conflict, by construing the Acts to limit not just the Rosebud Sioux's land use, but also their jurisdiction.[12]

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view, removed from the Reservation—by Act and Presidential Proclamation. Under this view, the Indians living in Mellette County, opened in 1910, would not have been entitled to the proceeds from the 1910 sales.

[11] 1904 Act, § 1, Art. V; 1907 Act, § 8; 1910 Act, § 11.

[12] The Court concludes that two other provisions in the Acts support its interpretation. First, it notes, *ante*, at 599–601, 608, that in all three Acts Congress agreed to purchase two sections of the opened counties for school purposes. See n. 4, *supra*. Under the enabling Act admitting the Dakotas to the United States, Act of Feb. 22, 1889, § 10, 25 Stat. 679, Congress granted these sections to the State when a reservation was to be "extinguished and such lands [are] restored to, and becom[e] a part of, the public domain." Based on ambiguous statements in the legislative history, *e. g.*, H. R. Rep. No. 443, 58th Cong., 2d Sess., 2 (1904) (the school provisions are "in conformity with . . . the enabling act"), the Court concludes that the grants in the Rosebud Acts were included " 'to implement the

B

The Court's construction of the Rosebud Acts is also untenable when the Acts are placed in historical context. Just as we held in *Mattz* that the statute at issue there was to be interpreted "from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388," 412 U. S., at 496, so, too, must the Rosebud Acts be construed from this perspective. As we observed in *Mattz:*

"[The policy of the General Allotment Act] was to continue the reservation system and the trust status of In-

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grant in the enabling act and for no other reason.'" *Ante,* at 600. But if that were true, the provisions in question would have been unnecessary, since the grant in the enabling Act was self-executing. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 392–393 (1902). Indeed, in 1902 the House Committee on Indian Affairs had reached this conclusion with respect to the proposed bill ratifying the 1901 Agreement, and, accordingly, it had deleted the school provisions from the Senate version of the bill. H. R. Rep. No. 2099, 57th Cong., 1st Sess., 1 (1902). Since the Committee included school provisions in the subsequent Rosebud Acts, *e. g.,* H. R. Rep. No. 443, *supra,* at 2, it apparently believed that the change in the nature of the transaction meant that Congress was no longer extinguishing the Reservation and restoring the land to the public domain. Nothing in the legislative history suggests, as the Court seems to imply, *ante,* at 601 n. 24, that Congress thought it was accomplishing the former but not the latter.

Second, the Court notes, *ante,* at 613–615, that § 10 of the 1910 Act subjected the opened lands "'to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.'" The Court reasons that if Congress believed the Reservation would remain intact this provision was unnecessary, since the Act of July 23, 1892, 27 Stat. 260, already prohibited the introduction of intoxicants into "Indian country." *Ante,* at 614 n. 47. But in 1910 the definition of "Indian country" was unsettled, and Congress may have feared that patented land *within* a reservation was nevertheless not Indian country under *Bates* v. *Clark,* 95 U. S. 204 (1877), because Indian *title* had been extinguished. Nothing in *Dick* v. *United States,* 208 U. S. 340 (1908), on which the Court relies, *ante,* at 614 n. 47, is to the contrary, as *Dick* involved ceded lands as to which the United States and the Indians had agreed federal laws would be applicable.

> dian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." *Ibid.* (footnote omitted).

This policy reflected Congress' attempt "to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands." *DeCoteau* v. *District County Court*, 420 U. S., at 432. Because the "familiar forces," *id.*, at 431, at work on Congress demanded land for settlers, Congress opened the reservations. But because these forces were not overly concerned with the niceties of reservation boundaries, the reservation status of the opened areas was preserved until the trust period expired, to insure federal protection of the Indians while they were being "civilized" through contacts with white settlers. Thus, to interpret the Rosebud Acts as terminating three-fourths of the Rosebud Reservation is to set them at war with Congress' general policy toward Indians at the time the Acts were approved.

III

The Court ultimately rests its construction of the Acts on an analysis of their legislative history. While there may be occasional passages in the history that suggest an intent to terminate,[13] I cannot agree that such an intent is established with anything approaching the requisite clarity.

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[13] The statements that most clearly suggest an intent to terminate are fully intelligible only to those with a knowledge of the geography of the Reservation. For example, in the House Committee Report on the 1904 Act, the Committee stated:

"There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of

In the first place, the legislative history of the Rosebud Acts is extraordinarily sparse. The 1904 Act, which the Court properly regards as the crucial Act, was introduced by Representative Burke of South Dakota on January 19, 1904, 38 Cong. Rec. 902–903; was reported out of the Committee on Indian Affairs, which Mr. Burke chaired, two days later, *id.*, at 1010; and passed the House on February 1, *id.*, at 1469, after a debate that consumes only six pages in the Congressional Record, *id.*, at 1423–1429.[14] The bill was transmitted to the Senate the same day; was reported out of the Committee chaired by Senator Gamble of South Dakota three days later, *id.*, at 1601; and was called up, amended, and approved by the Senate without debate on April 18, *id.*, at 4988.[15] The House concurred in the Senate amendments the following day without any discussion. *Id.*, at 5155. The 1907 Act received

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the Reservation, which will be left compact and in a square tract . . . ." H. R. Rep. No. 443, *supra*, at 3.

By consulting a map one discovers that without Gregory County—the tract in question—the Rosebud Reservation would be "compact" and "square." See also 41 Cong. Rec. 3104 (1907) (remarks of Rep. Burke: "They will have left, after this land is disposed of, a reservation that is substantially 50 miles square"); S. Rep. No. 68, 61st Cong., 2d Sess., 2 (1910) ("The present area of the Rosebud Indian Reservation aggregates about 1,800,000 acres"); H. R. Rep. No. 332, 61st Cong., 2d Sess., 2 (1910) ("There will still be left a reservation containing about 1,000,000 acres, and . . . there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of").

[14] In the preceding session of Congress, Representative Burke had introduced an identical bill, 36 Cong. Rec. 2409 (1903), which was approved by his Committee two days later, *id.*, at 2473, but never reached the House floor.

[15] Senator Gamble had introduced a similar bill the preceding year, *id.*, at 2434, had obtained Committee approval in two days, *id.*, at 2498; and Senate approval, without debate six days later, *id.*, at 2747–2748. He reintroduced the bill on January 25, 1904, 38 Cong. Rec. 1100, but the House bill was approved before the Senate could act on Senator Gamble's bill. See *id.*, at 1877.

even less congressional attention. It was approved within one month after it was introduced without any debate in the Senate, 41 Cong. Rec. 3323 (1907), and with a debate in the House that occupies only one page in the Record, *id.*, at 3104.[16] Only the 1910 Act was seriously debated by Congress, and these debates focused almost exclusively on the method by which the opened lands would be distributed to white settlers. 45 Cong. Rec. 1066–1071, 5456–5473 (1910).

In light of the brevity of the debates, it is not surprising that there is a paucity of relevant materials. The Court finds just two quotations from the debates, *ante*, at 596, 608, and three quotations from the Committee Reports, *ante*, at 595, 611, 612, that directly bear on the disestablishment issue.[17] What the Court cannot find, however, is particularly telling. Unlike the debates in *Mattz* which revealed that "the establishment of the reservation . . . was viewed as a mistake and an injustice," 412 U. S., at 500, there were no expressions of hostility toward the existence or size of the Rosebud Reservation. Nor were there any statements indicating that Congress intended to deviate from its general policy of preserving reservations or to abandon its role as guardian of the Indians living in the opened counties. Indeed, although Congress was

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[16] Representative Burke and Senator Gamble each had introduced similar bills in December 1906, 41 Cong. Rec. 15, 50–51. After an agreement was reached between the Tribe and Inspector McLaughlin on January 21, 1907, Representative Burke introduced a new bill, *id.*, at 1782. On February 14, 1907, the Office of Indian Affairs recommended that the agreement be approved (even though the Indians had not assented), and the bill was reported out of the House Committee that same day, *id.*, at 3004. Two days later it passed the House. *Id.*, at 3105.

On February 18, the Senate Committee sent to the Senate a substitute version of the 1906 Gamble bill. *Id.*, at 3207. By that time, however, the House had already approved the second Burke bill, and the Senate amended and approved that bill on February 19, *id.*, at 3323.

[17] The Court also quotes some discussions bearing on the school lands and liquor law provisions. See n. 12, *supra*.

aware that the Rosebud Acts initiated a new policy toward surplus lands [18]—one which removed the Government from the role of buyer and the Indians from the role of seller—at no point in the debates did anyone discuss the consequences of this change on Reservation boundaries.

The poverty of the Court's analysis is best revealed by its treatment of the history of the crucial 1904 Act. The Court begins with "the undisputed fact that the 1901 Agreement, had it been ratified by Congress, would have disestablished that portion of the Rosebud Reservation which lay in Gregory County." *Ante*, at 591. Its review of the legislative history then leads it to conclude that "there is no indication that Congress intended to change anything other than the form of, and responsibility for, payment." *Ante*, at 594–595. But the fact that Congress did not expressly repudiate all of the consequences of an Agreement to which it was not a party and which it had refused to ratify hardly establishes that Congress affirmatively intended those consequences to result from the very different transaction it devised in 1904.[19] It is at least

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[18] See, *e. g.*, H. R. Rep. No. 443, 58th Cong., 2d Sess., 2 (1904) ("[T]hese bills present a new idea . . . and . . . will establish a new policy and be a departure from the policy that has long since prevailed").

[19] Although the Court states that the " 'problem in the Congress [with respect to the 1901 Agreement] was not jurisdiction, title, or boundaries. It was, simply put, money,' " *ante*, at 591 n. 10, the historical evidence is not nearly so clear. In the Senate, the concern with the 1901 Agreement was not with the fact that the United States was expending money to acquire the lands, but with its failure to obtain reimbursement from settlers. After much debate, however, the Senate ultimately rejected an amendment that would have required settlers to purchase the opened lands from the United States, 35 Cong. Rec. 4971 (1902), and approved the agreement, *id.*, at 5024. The House, on the other hand, never even debated the ratification bill, and thus we have no firsthand knowledge of the basis for the opposition in that body. All of the statements that the Court relies on were made by *proponents* of the 1901 Agreement in connection with the 1903 and 1904 bills. *Ante*, at 591, and n. 10. Moreover, the fact that the House apparently was unwilling to authorize the United

equally plausible that Congress did not explain the effect of the 1904 Act because it assumed that the Act would have precisely the same effect as earlier nonpurchase surplus land Acts such as those considered in *Mattz:* The lands would be opened and the reservations preserved. Nor is the fact that Congress adopted the format of the 1901 Agreement especially probative, since this may have been done simply out of convenience.

Ultimately, what the legislative history demonstrates, as cocounsel for the State has aptly concluded, is that Congress manifested an "almost complete lack of . . . concern with the boundary issue." [20] The issue was of no great importance in the early 1900's as it was commonly assumed that all reservations would be abolished when the trust period on allotted lands expired. There was no pressure on Congress to accelerate this timetable, so long as settlers could acquire unused land. Accordingly, Congress simply did not focus on the boundary question. Its indifference is perhaps best manifested by the fact that in legislation concerning the Reservation enacted immediately subsequent to the Rosebud Acts, Congress at times referred to the opened counties as part of the Reservation, and at times referred to them as no longer part of the Reservation.[21] For the Court to find in this con-

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States to purchase the lands and recoup the costs from the settlers suggests that money was not the sole concern.

[20] Comment, New Town et al.: The Future of an Illusion, 18 S. D. L. Rev. 85, 117 (1973).

[21] For example, in 1909 Congress appropriated funds for a mission "[o]n the Rosebud Reservation," and included within this category a mission in Gregory County. 35 Stat. 809. On the other hand, a 1905 Act extending the time for settling in Gregory County referred to the lands as "heretofore a part of the Rosebud Indian Reservation." C. 545, 33 Stat. 700. The modern statutes appear to be more consistent in labeling the opened counties as part of the Reservation. See 77 Stat. 349 (1963); 78 Stat. 560 (1964); 89 Stat. 577 (1975).

The subsequent treatment of the disputed counties by the Interior

fusion and indifference a "clear" congressional intent to disestablish the Reservation is incomprehensible.

IV

The most obvious and immediate consequence of today's decision is jurisdictional. Even though the people of South Dakota have expressly declined to assume jurisdiction over Indian country,[22] from now on crimes (or torts) committed by the Indians on nontrust land in the opened counties will be within the jurisdiction of the State. This will create an "impractical pattern of checkerboard jurisdiction," in which "law enforcement officers . . . will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the State or Federal Government." *Seymour* v. *Superintendent*, 368 U. S., at 358. In addition, even while on their trust lands, the almost 2,000 enrolled Indians in the opened counties will be generally subject to "state law otherwise applicable to all citizens of the State," *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 149 (1973), even if the same law could not be applied to Reservation Indians because it would "interfere with reservation self-government or would impair a right granted or reserved

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Department reflects a similar confusion as to the status of the counties. Each side has presented to this Court a number of instances in which the counties were referred to by Department personnel in terms favorable to their case. Compare Brief for United States as *Amicus Curiae* 33–38, 33a–41a, with Brief for Respondents 106–120. In the two instances in which Department officials have addressed the question directly, however, they have concluded that the opened counties are part of the Reservation. 54 I. D. 559 (1934) (opinion of Commissioner of Indian Affairs on Restoration of Lands Formerly Indian to Tribal Ownership); App. 1398–1404 (memorandum of Field Solicitor, Aberdeen, S. D., Apr. 6, 1972).

[22] At oral argument we were informed that in 1962 the people of South Dakota rejected by a referendum an Act of the legislature that would have granted the State jurisdiction over Indian country pursuant to §§ 6, 7, 67 Stat. 590 (1953). Tr. of Oral Arg. 10.

by federal law," *id.*, at 148. This is reason enough to be troubled by today's decision.

But beyond these jurisdictional consequences, the holding today places a grave cloud over the property rights of both the Tribe and the Indians living off the newly contracted Reservation. With respect to the Tribe, 4,600 acres in the opened counties were returned to it pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, after the Secretary found, in the words of § 3 of the Act, that these were "the remaining surplus lands of [an] Indian reservation" opened before June 18, 1934. But if the opened counties were not part of the Reservation, then the Secretary's right to return the land to the Tribe is at least open to question.[23] More seriously, the Indians living on trust lands in the opened counties have assumed that § 2 of the Reorganization Act, which extended the trust period on "Indian lands," applied to their property. But if these counties were not part of a reservation, this assumption is dubious at best, since § 8 of the Act states that the Act shall not "be construed to relate to Indian holdings of allotments . . . upon the public domain outside of the geographic boundaries of any Indian reservation now existing . . . ." Should it be determined that the trust period was not extended, the State of South Dakota could claim crushing amounts of back taxes.

Finally, today's decision may result in a sharp reduction in the federal aid available to members of the Rosebud Tribe living off the Reservation. The Bureau of Indian Affairs has been administering the opened counties as part of the Reservation, see n. 2, *supra*, and in requesting appropriations for the Reservation Indians has included Indians living in the

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[23] Arguably the Secretary acted properly so long as the lands were part of the Reservation at the time they were opened. See 56 I. D. 330 (1938). This was not the theory on which the Secretary proceeded, however, in ordering restoration. 54 I. D. 559 (1934).

opened counties, Brief for United States as *Amicus Curiae* 37–38. In addition, we have been advised by the Association on American Indian Affairs et al., as *amici curiae*, that the Rosebud Tribe has received a large amount of federal aid pursuant to a variety of federal programs. Brief 31–39. The Association reports that in the past the Tribe has been able to expend these monies for programs in the opened as well as the closed counties, because the federal agencies have viewed all the counties as part of the Reservation. *Ibid.* But in light of today's decision, the Tribe's ability to use federal funds to benefit tribal members living in these counties is in serious doubt.[24]

Nor are these potential consequences limited to the Rosebud Reservation. The Rosebud Acts were described by their sponsors as the beginning of a new policy with respect to surplus lands. See n. 18, *supra*. During the decade following the enactment of the first Rosebud Act, Congress passed 21 other statutes that opened surplus reservation lands to settlers.[25] If the Rosebud Acts diminished the Rosebud Res-

[24] For example, according to the United States, the Department of Housing and Urban Development, which has been making grants to the Tribe, will no longer be able to approve projects in the opened counties, since with respect to those counties the Tribe will no longer be a "governmental entity" or "public body" under 42 U. S. C. § 1460 (h). Brief for United States as *Amicus Curiae* 38. The Department of Agriculture has already ruled, in light of the Court of Appeals decision, that money made available to the Tribe to acquire lands pursuant to 25 U. S. C. § 488, cannot be used in the opened counties. Brief for Association on American Indian Affairs et al. as *Amici Curiae* 36.

Of course, in holding that the opened counties are outside the Reservation, the Court does not necessarily preclude the Government or the Tribe from providing any aid to Indians in those counties. Cf. *Morton* v. *Ruiz*, 415 U. S. 199 (1974).

[25] National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279. Of these statutes, five were passed with the consent of the affected Indians; these five were enacted within a year after the first Rosebud Act.

In addition to the 21 post-Rosebud Act statutes, there are at least five

ervation, then the boundaries of more than a score of other reservations must be in doubt.

Because I can find no principled justification for inflicting manifold injuries on the Rosebud Sioux Indians and for jeopardizing the rights of numerous other tribes, I respectfully dissent.

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pre-Rosebud Act laws which also opened surplus reservation land to settlers without Indian consent. There are also at least 15 pre-Rosebud Act laws which opened surplus land with consent.

ALEXANDER, SECRETARY OF THE ARMY *v.* FIOTO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 75-1704. Argued March 1, 1977—Decided April 4, 1977

Although he met the other requirements for eligibility, appellee was denied retirement pay for his service in the National Guard on the basis of 10 U. S. C. § 1331 (c). That section provides that persons who had been in the Reserves or National Guard before the termination of World War II are not "eligible for retired pay" unless they served on active duty during wartime. *Held:*

1. Both the plain language of § 1331 (c) and its legislative history demonstrate that Congress intended to deny benefits to those with pre-World War II service who did not also serve in wartime. Pp. 636–639.

2. Congress authorized retirement pay as an inducement to continued service in order to maintain a cadre of trained soldiers for use on active duty should the need arise; Congress had the constitutional power to decide not to offer the inducement to reservists less likely to perform such duty than others. Pp. 639–640.

409 F. Supp. 831, reversed.

STEVENS, J., delivered the opinion of the Court, in which all Members joined, except REHNQUIST, J., who took no part in the consideration or decision of the case.

Stephen L. Urbanczyk argued the cause for appellant *pro hac vice*. With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Deputy Solicitor General Jones*, and *William Kanter*.

David Goldfarb argued the cause for appellee. With him on the brief were *Kalman Finkel, Helaine Barnett, Joan Mangones*, and *John E. Kirklin*.*

**Penrose Lucas Albright* filed a brief for the United States Merchant Marine Academy Alumni Assn. as *amicus curiae* urging affirmance.

MR. JUSTICE STEVENS delivered the opinion of the Court.

After World War II Congress authorized retirement pay for nonregular military personnel with at least 20 years of service in the Reserves or National Guard.[1] However, under 10 U. S. C. § 1331 (c), those who had been in the Reserves before World War II are not eligible for benefits unless they performed active duty during wartime.[2] Appellee had no such active duty.[3] He contends that he may not be denied benefits for which he is otherwise eligible simply because he had prewar service in the Guard. In the District Court he argued that the statute violates the equal protection principle inherent in the Due Process Clause of the Fifth Amendment. In this Court he also argues that the statute should be construed as

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[1] The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 10 U. S. C. § 1331 *et seq.*, authorizes retirement pay for reservists and guardsmen who have accumulated 20 years of eligible service, are 60 years of age, and are not disqualified by § 1331 (c).

[2] Section 1331 (c) provides:

"No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332 (a) (1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953."

[3] Appellee served in the National Guard from 1933 to 1940 and again from 1947 to 1967. The record does not reveal the reason for appellee's failure to serve during World War II. Although he was in the Guard between June 26, 1950 and July 28, 1953, he performed no active duty (other than for training) during that time; again, the record does not reveal why he did not perform active duty during the Korean hostilities. At oral argument in the District Court appellee's counsel represented that appellee had been unable to serve in World War II because of injuries received in an automobile accident, but there is no support in the record for this assertion. For purposes of this appeal, however, we assume that his failure to serve in World War II was involuntary.

merely providing that his years of prewar service must be ignored for the purpose of determining his eligibility. We reject both arguments.

The case is here on direct appeal from a summary judgment entered by a three-judge District Court sitting in the Eastern District of New York.[4] That court ordered the Secretary of the Army to pay retirement benefits to appellee and to place the members of the class he represents on the retirement rolls.[5] 409 F. Supp. 831 (1976). Because the three-judge court was properly convened,[6] we have jurisdiction even though the decision of the District Court can be read as resting on its interpretation of the statute rather than squarely on constitutional grounds.[7]

Section 1331 (c) plainly discriminates between persons who

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[4] Federal jurisdiction was predicated on 28 U. S. C. § 1361.

[5] The class as certified by the District Court, App. 38, includes all

"persons at least 60 years of age who have performed 20 years of service computed under 10 USC § 1332 since August 16, 1945 and otherwise are entitled to Retired Pay for Non-Regular Military Service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 5, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 and before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 USC § 1331 (c)." *Id.*, at 6.

The District Court stayed its judgment as to all members of the class other than appellee.

[6] The only basis for injunctive relief set forth in the complaint was the alleged unconstitutionality of § 1331 (c); a three-judge court was therefore required to hear the application for injunctive relief. See 28 U. S. C. § 2282.

[7] Title 28 U. S. C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

See *Philbrook* v. *Glodgett*, 421 U. S. 707, 712–713, n. 8.

were in the Reserves before August 16, 1945, and those who performed their first service after that date. The statute says that the members of the former group are not "eligible for retired pay" unless they performed active duty during specified dates when the country was engaged in hostilities.

Appellee acknowledges that the statute creates two distinct classes of reservists. He contends, however, that the members of his class are not ineligible for benefits, but merely are prevented from counting pre-World War II service as part of the 20 years of "satisfactory service" needed to qualify.[8] The argument is foreclosed by the plain language of the statute. Moreover, the legislative history reveals a congressional purpose inconsistent with appellee's interpretation.

Section 1331 (c) is a description of *persons* who are not eligible for retirement pay.[9] It does not describe periods of service which may or may not be counted toward eligibility. Its text plainly disqualifies the persons it describes. Furthermore, § 1331 (a), which defines the conditions of eligibility for retirement pay, states that a person meeting these conditions is entitled to retirement pay "[e]xcept as provided in subsection (c)." It is difficult to believe that language this clear could be the product of a drafting error. We are persuaded that Congress meant what it so plainly said.

An explanation for excluding certain persons from benefits—as opposed to excluding part of their service—was given by

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[8] The same bill that contained § 1331 (c) also created a point system for determining whether sufficient service was performed in a given year to count toward the 20-year requirement. 10 U. S. C. § 1332. Years served before the point system are automatically considered "satisfactory service." § 1332 (a). Appellee contends that Congress generally excluded such years of prior service because the point system had not been in effect, and therefore there was no way to determine whether substantial service had been rendered in those years. Then, appellee argues, Congress made an exception for those men who served in World War II as a reward for their wartime service.

[9] Section 1331 (c) is quoted in full in n. 2, *supra*.

the chairman of the Senate Armed Services Committee during the hearings on the bill. He pointed out that the provision would "make certain that no one who drops out of the Reserves to avoid service in the war is qualified under the bill. This is concurred in by the services and the Reserves." [10] The Senate Committee had been advised by the Army Chief of Staff that: "The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify." [11]

These comments describe a purpose to disqualify certain persons rather than merely a purpose to treat a part of their service as unsatisfactory.

In 1958 Congress amended § 1331 (c) to remove the disqualification for persons who served in the Korean conflict.[12] The history of this amendment reflects an intent to make retirement pay available for otherwise "ineligible persons" rather than a desire to classify periods of service as satisfactory.[13] The statutory language and its legislative history

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[10] Hearings on H. R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess., 77 (1948).

[11] *Id.*, at 29.

[12] In the interim, there was a slight change in the language of the provision. As originally enacted, it provided that such persons would not be eligible for "retirement benefits." § 302 (a), 62 Stat. 1087. When Title 10 was enacted into positive law, the language was changed to "retired pay." 70A Stat. 102. Appellee argues that the original language was ambiguous, because the phrase the "right to accrue retirement benefits" was used elsewhere in the same Act to refer to the accrual of credit for years of satisfactory service. See § 304, 62 Stat. 1089. But we see no reason to assume that the same meaning was intended, for one section refers to "accrual" of *additional* benefits, while the other refers to "eligibility" for *any* benefits.

[13] For instance, the Senate Report described the amendment as a bill "to make retired pay for nonregular service available to certain persons . . . ." S. Rep. No. 2188, 85th Cong., 2d Sess., 1 (1958). The same understanding was expressed during the House hearings by the representative of the Defense Department. He stated that "[t]he Department of

convincingly demonstrate that Congress made a deliberate decision to deny retirement pay to members of appellee's class.

Appellee argues that the Constitution requires equal treatment for all reservists with 20 years of satisfactory service and that it is totally irrational to disqualify some of them simply because they had *additional* years of service before August 16, 1945. We disagree.

The retirement pay program was intended to provide an inducement to qualified personnel to remain active in the Reserves in order to maintain a cadre of trained soldiers for use in active duty if the need should arise.[14] Such an inducement would be unlikely to achieve its intended purpose if offered to persons who had dropped out of the Reserves to avoid service during the war.[15] Moreover, the decision not

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Defense favors the extension of such retirement benefits to a small group of Reserve personnel who would be eligible for this benefit but for the fact that they do not meet the requirement of having performed active service during World Wars I or II." Hearings on Consideration of S. 2630, H. R. 4381, H. R. 8775 and H. R. 781 before Subcommittee No. 1 of the House Committee on Armed Services, No. 88, 85th Cong., 2d Sess., 7897 (1957). A later colloquy is to the same effect:

"Mr. Winstead. And there would be no differential in the pay for retirement with those years counted if this passed as to what they would get if we did not pass this?

"Mr. Ducander. They won't be able to retire at all.

"Mr. Winstead. They should be covered." *Id.*, at 7905.

[14] The Senate Report states that the primary purpose of the Act was "to provide an inducement to members of Reserve components to remain active in the Reserves over a long period of time, thereby providing a better trained and more ready Reserve to meet the needs of our national-defense structure." S. Rep. No. 1543, 80th Cong., 2d Sess., 9 (1948). See also Hearings on H. R. 2744, n. 10, *supra*, at 13 (testimony of Gen. Dahlquist), 22–24 (testimony of Col. Maas).

[15] See the excerpt from the legislative history quoted, *supra*, at 638. Although the statutory exclusion is broader than necessary to accomplish that purpose, it cannot be doubted that it would apply to the persons that Congress wanted to be *certain* to disqualify.

to offer the inducement to reservists whose failure to serve was involuntary, reflects a predictive judgment that a past obstacle to active service may have a continuing effect on future availability.

When Congress enacted the statute in 1948, it did not penalize the members of appellee's class; it merely made a judgment that they were somewhat less desirable prospects for future active duty than others, and therefore decided not to offer them a special inducement to remain in the Reserves. The statutory exclusion is unquestionably the product of a deliberate and rational choice which Congress had the constitutional power to make.

The judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

Syllabus

UNITED STATES v. ANTELOPE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-661. Argued January 18, 1977—Decided April 19, 1977

Respondents, enrolled Coeur d'Alene Indians, were indicted by a federal grand jury on charges of burglary, robbery, and murder of a non-Indian within the boundaries of their reservation. One respondent was convicted of second-degree murder only; the other two were convicted of all three crimes as charged, including first-degree murder under the felony-murder provisions of the federal-enclave murder statute, 18 U. S. C. § 1111, as made applicable to Indians by the Major Crimes Act, 18 U. S. C. § 1153. The Court of Appeals reversed on the ground that respondents had been denied their constitutional rights under the equal protection component of the Fifth Amendment's Due Process Clause. The court agreed with respondents' contention that their felony-murder convictions were racially discriminatory since a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, under which premeditation and deliberation would have had to be proved, whereas no such elements were required under the felony-murder provisions of 18 U. S. C. § 1111. *Held:* Respondent Indians were not deprived of the equal protection of the laws. Pp. 645–650.

(a) The federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications. Federal regulation of Indian tribes is rooted in the unique status of Indians as "a separate people" with their own political institutions, and is not to be viewed as legislation of a "'racial' group consisting of 'Indians'. . . ." *Morton* v. *Mancari*, 417 U. S. 535, 553 n. 24. Pp. 645–647.

(b) The challenged statutes do not otherwise violate equal protection. Respondents were subjected to the same body of law as any other individuals, Indian or non-Indian, charged with first-degree murder committed in a federal enclave. Congress has undoubted power to prescribe a criminal code applicable to Indian country, and the disparity between federal law and Idaho law has no equal protection or other constitutional significance. Pp. 647–650.

523 F. 2d 400, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh, Harry R. Sachse,* and *Jerome M. Feit.*

Allen V. Bowles, by appointment of the Court, 429 U. S. 892, argued the cause and filed a brief for respondent Antelope. *John W. Walker,* by appointment of the Court, *ibid.,* argued the cause and filed a brief for respondents Davison et al.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

(1)

On the night of February 18, 1974, respondents, enrolled Coeur d'Alene Indians, broke into the home of Emma Johnson, an 81-year-old non-Indian, in Worley, Idaho; they robbed and killed Mrs. Johnson. Because the crimes were committed by enrolled Indians within the boundaries of the Coeur d'Alene Indian Reservation, respondents were subject to federal jurisdiction under the Major Crimes Act, 18 U. S. C. § 1153.[1] They were, accordingly, indicted by a federal grand jury on

[1] Title 18 U. S. C. § 1153 at the time in question provided in pertinent part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties

charges of burglary, robbery, and murder.[2] Respondent William Davison was convicted of second-degree murder only. Respondents Gabriel Francis Antelope and Leonard Davison were found guilty of all three crimes as charged, including first-degree murder under the felony-murder provisions of 18 U. S. C. § 1111,[3] as made applicable to enrolled Indians by 18 U. S. C. § 1153.

(2)

In the United States Court of Appeals for the Ninth Circuit, respondents contended that their felony-murder convictions

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as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

The background leading up to enactment of the Major Crimes Act is discussed in *Keeble* v. *United States*, 412 U. S. 205, 209–212 (1973). As noted in that case, the Government has characterized the Major Crimes Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." *Id.*, at 209.

[2] Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts. 18 U. S. C. § 1152. Not all crimes committed within Indian country are subject to federal or tribal jurisdiction, however. Under *United States* v. *McBratney*, 104 U. S. 621 (1882), a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law.

[3] Title 18 U. S. C. § 1111 is the federal murder statute. It provides in pertinent part:

"(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

"Any other murder is murder in the second degree."

It should be emphasized that respondent William Davison was convicted only of second-degree murder, not felony murder, under 18 U. S. C. § 1111.

were unlawful as products of invidious racial discrimination. They argued that a non-Indian charged with precisely the same offense, namely the murder of another non-Indian within Indian country,[4] would have been subject to prosecution only under Idaho law, which in contrast to the federal murder statute, 18 U. S. C. § 1111, does not contain a felony-murder provision.[5] To establish the crime of first-degree murder in state court, therefore, Idaho would have had to prove premeditation and deliberation. No such elements were required under the felony-murder component of 18 U. S. C. § 1111.

Because of the difference between Idaho and federal law, the Court of Appeals concluded that respondents were "put at a serious racially-based disadvantage," 523 F. 2d 400, 406 (1975), since the Federal Government was not required to establish premeditation and deliberation in respondents' federal prosecution. This disparity, so the Court of Appeals concluded, violated equal protection requirements implicit in the Due Process Clause of the Fifth Amendment. We granted the United States' petition for certiorari, 424 U. S. 907 (1976), and we reverse.

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[4] See n. 2, *supra*. Federal law ostensibly extends federal jurisdiction to all crimes occurring in Indian country, except offenses subject to tribal jurisdiction. 18 U. S. C. § 1152. However, under *United States* v. *McBratney*, *supra*, and cases that followed, this Court construed § 1152 and its predecessors as not applying to crimes by non-Indians against other non-Indians. Thus, respondents correctly argued that, had the perpetrators of the crimes been non-Indians, the courts of Idaho would have had jurisdiction over these charges.

[5] Idaho statutes contain the following definition of first-degree murder:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, . . . shall be murder in the first degree. . . . All other kinds of murder are of the second degree." Idaho Code § 18–4003 (Supp. 1976).

(3)

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution [6] and supported by the ensuing history of the Federal Government's relations with Indians.

> "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975).

Legislation with respect to these "unique aggregations" has repeatedly been sustained by this Court against claims of unlawful racial discrimination. In upholding a limited employment preference for Indians in the Bureau of Indian Affairs, we said in *Morton* v. *Mancari*, 417 U. S. 535, 552 (1974):

> "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased . . . ."

In light of that result, the Court unanimously concluded in *Mancari:*

> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Id.*, at 554.

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[6] Article I, § 8, of the Constitution gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Last Term, in *Fisher* v. *District Court*, 424 U. S. 382 (1976), we held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts in connection with an adoption proceeding arising on their reservation. Unlike *Mancari*, the Indian plaintiffs in *Fisher* were being denied a benefit or privilege available to non-Indians; nevertheless, a unanimous Court dismissed the claim of racial discrimination:

> "[W]e reject the argument that denying [the Indian plaintiffs] access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." 424 U. S., at 390.

Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ." *Morton* v. *Mancari*, *supra*, at 553 n. 24. Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe.[7] We

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[7] As was true in *Mancari*, federal jurisdiction under the Major Crimes Act does not apply to "many individuals who are racially to be classified as 'Indians.'" 417 U. S., at 553 n. 24. Thus, the prosecution in this case offered proof that respondents are enrolled members of the Coeur

therefore conclude that the federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications.

(4)

The challenged statutes do not otherwise violate equal protection.[8] We have previously observed that Indians in-

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d'Alene Tribe and thus not emancipated from tribal relations. Moreover, members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act. *United States* v. *Heath*, 509 F. 2d 16, 19 (CA9 1974) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status *vis-à-vis* the Federal Government no longer exists"). In addition, as enrolled tribal members, respondents were subjected to federal jurisdiction only because their crimes were committed within the confines of Indian country, as defined in 18 U. S. C. § 1151. Crimes occurring elsewhere would not be subject to exclusive federal jurisdiction. *Puyallup Tribe* v. *Department of Game*, 391 U. S. 392, 397 n. 11 (1968).

It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and "maintained tribal relations with the Indians thereon." *Ex parte Pero*, 99 F. 2d 28, 30 (CA7 1938). See also *United States* v. *Ives*, 504 F. 2d 935, 953 (CA9 1974) (dicta). Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U. S. C. § 1153, and we therefore intimate no views on the matter.

[8] Other than their argument that the federal statutes create an invidious racial classification, respondents do not seriously contend that application of federal law to Indian tribes is so irrational as to deny equal protection. See n. 11, *infra*. They do point, however, to Congress' relinquishment of criminal jurisdiction over Indians in six States pursuant to 18 U. S. C. § 1162. But § 1162 is simply one manifestation of Congress' continuing concern with the welfare of Indian tribes under federal guardianship. Indeed, in adopting § 1162, Congress singled out certain reservations to remain subject to federal criminal jurisdiction. Congress' selective approach in § 1162 reinforces, rather than undermines, the conclusion that legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution.

dicted under the Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction. *Keeble* v. *United States*, 412 U. S. 205, 212 (1973). See 18 U. S. C. § 3242. Respondents were, therefore, subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave.[9] They do not, and could not, contend otherwise.

There remains, then, only the disparity between federal and Idaho law as the basis for respondents' equal protection claim.[10] Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, *United States* v. *Kagama*, 118 U. S. 375 (1886), it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State

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[9] Federal jurisdiction would extend to crimes, regardless of the race of the perpetrator or victim, committed on federal enclaves, such as military installations, or on vessels of the United States on the high seas.

Congress has provided for federal jurisdiction over the crime of murder on a reservation, much as on other federal enclaves, 18 U. S. C. §§ 1111, 1153. But as our opinions have recognized that Indian reservations differ in certain respects from other federal enclaves, the statute has been construed as not encompassing crimes on the reservation by non-Indians against non-Indians. *United States* v. *McBratney*, 104 U. S. 621 (1882); see *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651 (1930); *Williams* v. *Lee*, 358 U. S. 217, 219–220 (1959); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 171 (1973). Federal statutes do not single out Indians as such; non-Indian defendants are also covered if the victim was a member of the tribe.

[10] Respondents base their equal protection claim on the assumption that they have been disadvantaged by being prosecuted under federal law. In their view, their murder convictions were made more likely by the fact that federal prosecutors were not required to prove premeditation. However, they do not seriously question that the evidence adduced at their federal trial might well have supported a finding of premeditation and deliberation, since respondents were found to have beaten and kicked Mrs. Johnson to death during the course of a planned robbery.

of Idaho. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded,[11] regardless of the laws of States with respect to the same subject matter.[12]

The Federal Government treated respondents in the same manner as all other persons within federal jurisdiction, pursuant to a regulatory scheme that did not erect impermissible

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[11] It should be noted, however, that this Court has consistently upheld federal regulations aimed *solely* at tribal Indians, as opposed to *all* persons subject to federal jurisdiction. See, *e. g.*, *United States* v. *Holliday*, 3 Wall. 407, 417–418 (1866); *Perrin* v. *United States*, 232 U. S. 478, 482 (1914). See also *Rosebud Sioux Tribe* v. *Kneip*, *ante*, at 613–615, n. 47. Indeed, the Constitution itself provides support for legislation directed specifically at the Indian tribes. See n. 6, *supra*. As the Court noted in *Morton* v. *Mancari*, the Constitution therefore "singles Indians out as a proper subject for separate legislation." 417 U. S., at 552.

In this regard, we are not concerned with instances in which Indians tried in federal court are subjected to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense. Compare *United States* v. *Big Crow*, 523 F. 2d 955 (CA8 1975), cert. denied, 424 U. S. 920 (1976), and *United States* v. *Cleveland*, 503 F. 2d 1067 (CA9 1974), with *United States* v. *Analla*, 490 F. 2d 1204 (CA10), vacated and remanded, 419 U. S. 813 (1974). See 18 U. S. C. § 1153 (1976 ed.) (which provides for uniform penalties for both Indians and non-Indians charged with assault resulting in serious bodily injury). That issue is not before us, and we intimate no views on it.

[12] Indeed, had respondents been prosecuted under state law, they may well have argued, under this Court's holding in *Seymour* v. *Superintendent*, 368 U. S. 351 (1962), that the state conviction was void for want of jurisdiction. In *Seymour*, an enrolled member of the Colville Indian Tribe was convicted in state court of attempted burglary within Indian country. In reversing the state conviction, this Court held:

"Since the burglary with which petitioner was charged occurred on property . . . within the . . . [Indian] reservation, the courts of Washington had no jurisdiction to try him for that offense." *Id.*, at 359.

If state courts would have had no jurisdiction over respondents' case, then state law does not constitute a meaningful point of reference for establishing a claim of equal protection.

racial classifications; hence, no violation of the Due Process Clause infected respondents' convictions.[13]

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

[13] If we accepted respondents' contentions, persons charged with crimes on federal military bases or other federal enclaves could demand that their federal prosecutions be governed by state law to the extent that state law was more "lenient" than federal law. The Constitution does not authorize this kind of gamesmanship. Indeed, any such rule, even assuming its workability, is flatly inconsistent with the Supremacy Clause of the Constitution, Art. VI, cl. 2.

Syllabus

INGRAHAM ET AL. v. WRIGHT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-6527. Argued November 2-3, 1976—Decided April 19, 1977

Petitioners, pupils in a Dade County, Fla., junior high school, filed this action in Federal District Court pursuant to 42 U. S. C. §§ 1981–1988 for damages and injunctive and declaratory relief against respondent school officials, alleging that petitioners and other students had been subjected to disciplinary corporal punishment in violation of their constitutional rights. The Florida statute then in effect authorized corporal punishment after the teacher had consulted with the principal or teacher in charge of the school, specifying that the punishment was not to be "degrading or unduly severe." A School Board regulation contained specific directions and limitations, authorizing punishment administered to a recalcitrant student's buttocks with a wooden paddle. The evidence showed that the paddling of petitioners was exceptionally harsh. The District Court granted respondents' motion to dismiss the complaint, finding no basis for constitutional relief. The Court of Appeals affirmed. *Held:*

1. The Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply to disciplinary corporal punishment in public schools. Pp. 664–671.

(a) The history of the Eighth Amendment and the decisions of this Court make it clear that the prohibition against cruel and unusual punishment was designed to protect those convicted of crime. Pp. 664–668.

(b) There is no need to wrench the Eighth Amendment from its historical context and extend it to public school disciplinary practices. The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which that Amendment protects convicted criminals. These safeguards are reinforced by the legal constraints of the common law, whereby any punishment going beyond that which is reasonably necessary for the proper education and discipline of the child may result in both civil and criminal liability. Pp. 668–671.

2. The Due Process Clause of the Fourteenth Amendment does not require notice and hearing prior to imposition of corporal punishment as that practice is authorized and limited by the common law. Pp. 672–682.

(a) Liberty within the meaning of the Fourteenth Amendment is implicated where public school authorities, acting under color of state law, deliberately punish a child for misconduct by restraint and infliction of appreciable physical pain. Freedom from bodily restraint and punishment is within the liberty interest in personal security that has historically been protected from state deprivation without due process of law. Pp. 672–674.

(b) Under the longstanding accommodation between the child's interest in personal security and the traditional common-law privilege, there can be no deprivation of substantive rights as long as the corporal punishment remains within the limits of that privilege. The child nonetheless has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification. Pp. 675–676.

(c) The Florida scheme, considered in light of the openness of the school environment, affords significant protection against unjustified corporal punishment of schoolchildren. The teacher and principal must exercise prudence and restraint when they decide that corporal punishment is necessary for disciplinary purposes. If the punishment is later found to be excessive, they may be held liable in damages or be subject to criminal penalties. Where the State has thus preserved what "has always been the law of the land," *United States* v. *Barnett*, 376 U. S. 681, 692, the case for administrative safeguards is significantly less compelling than it would otherwise be. Pp. 676–680.

(d) Imposing additional administrative safeguards as a constitutional requirement would significantly intrude into the area of educational responsibility that lies primarily with the public school authorities. Prior procedural safeguards require a diversion of educational resources, and school authorities may abandon corporal punishment as a disciplinary measure rather than incur the burdens of complying with procedural requirements. The incremental benefit of invoking the Constitution to impose prior notice and a hearing cannot justify the costs. Pp. 680–682.

525 F. 2d 909, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 683. STEVENS, J., filed a dissenting opinion, *post*, p. 700.

Bruce S. Rogow argued the cause for petitioners. With him on the briefs were *Howard W. Dixon* and *Peter M. Siegel.*

Frank A. Howard, Jr., argued the cause and filed a brief for respondents.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents questions concerning the use of corporal punishment in public schools: First, whether the paddling of students as a means of maintaining school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment; and, second, to the extent that paddling is constitutionally permissible, whether the Due Process Clause of the Fourteenth Amendment requires prior notice and an opportunity to be heard.

I

Petitioners James Ingraham and Roosevelt Andrews filed the complaint in this case on January 7, 1971, in the United States District Court for the Southern District of Florida.[1] At the time both were enrolled in the Charles R. Drew Junior High School in Dade County, Fla., Ingraham in the eighth grade and Andrews in the ninth. The complaint contained three counts, each alleging a separate cause of action for deprivation of constitutional rights, under 42 U. S. C. §§ 1981–1988. Counts one and two were individual actions for damages by Ingraham and Andrews based on paddling incidents that allegedly occurred in October 1970 at Drew Junior High School. Count three was a class action for declaratory and

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Michael Nussbaum, Lucien Hilmer, Ronald G. Precup, and *David Rubin* filed a brief for the National Education Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Leon Fieldman* for the National School Boards Assn.; and by *Tobias Simon* and *Elizabeth J. du Fresne* for the United Teachers of Dade, Local 1974, AFT, AFL–CIO.

Gertrude M. Bacon filed a brief for the American Psychological Association Task Force on the Rights of Children and Youths as *amicus curiae.*

[1] As Ingraham and Andrews were minors, the complaint was filed in the names of Eloise Ingraham, James' mother, and Willie Everett, Roosevelt's father.

injunctive relief filed on behalf of all students in the Dade County schools.[2] Named as defendants in all counts were respondents Willie J. Wright (principal at Drew Junior High School), Lemmie Deliford (an assistant principal), Solomon Barnes (an assistant to the principal), and Edward L. Whigham (superintendent of the Dade County School System).[3]

Petitioners presented their evidence at a week-long trial before the District Court. At the close of petitioners' case, respondents moved for dismissal of count three "on the ground that upon the facts and the law the plaintiff has shown no right to relief," Fed. Rule Civ. Proc. 41 (b), and for a ruling that the evidence would be insufficient to go to a jury on counts one and two.[4] The District Court granted the motion as to all three counts, and dismissed the complaint without hearing evidence on behalf of the school authorities. App. 142–150.

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[2] The District Court certified the class, under Fed. Rules Civ. Proc. 23 (b)(2) and (c)(1), as follows: "'All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board . . . .'" App. 17. One student was specifically excepted from the class by request.

[3] The complaint also named the Dade County School Board as a defendant, but the Court of Appeals held that the Board was not amenable to suit under 42 U. S. C. §§ 1981–1988 and dismissed the suit against the Board for want of jurisdiction. 525 F. 2d 909, 912 (CA5 1976). This aspect of the Court of Appeals' judgment is not before us.

[4] Petitioners had waived their right to jury trial on the claims for damages in counts one and two, but respondents had not. The District Court proceeded initially to hear evidence only on count three, the claim for injunctive relief. At the close of petitioners' case, however, the parties agreed that the evidence offered on count three (together with certain stipulated testimony) would be considered, for purposes of a motion for directed verdict, as if it had also been offered on counts one and two. It was understood that respondents could reassert a right to jury trial if the motion were denied. App. 142.

Petitioners' evidence may be summarized briefly. In the 1970–1971 school year many of the 237 schools in Dade County used corporal punishment as a means of maintaining discipline pursuant to Florida legislation and a local School Board regulation.[5] The statute then in effect authorized limited corporal punishment by negative inference, proscribing punishment which was "degrading or unduly severe" or which was inflicted without prior consultation with the principal or the teacher in charge of the school. Fla. Stat. Ann. § 232.27 (1961).[6] The regulation, Dade County School Board Policy

[5] The evidence does not show how many of the schools actually employed corporal punishment as a means of maintaining discipline. The authorization of the practice by the School Board extended to 231 of the schools in the 1970–1971 school year, but at least 10 of those schools did not administer corporal punishment as a matter of school policy. *Id.*, at 137–139.

[6] In the 1970–1971 school year, § 232.27 provided:

"Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. . . ."

Effective July 1, 1976, the Florida Legislature amended the law governing corporal punishment. Section 232.27 now reads:

"Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed:

"(1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.

"(2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.

"(3) A teacher or principal who has administered punishment shall,

5144, contained explicit directions and limitations.[7] The authorized punishment consisted of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment was limited to one to five "licks" or blows with the paddle and resulted in

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upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other [adult] who was present." Fla. Stat. Ann. § 232.27 (1977) (codifier's notation omitted).

Corporal punishment is now defined as "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules." § 228.041 (28). The local school boards are expressly authorized to adopt rules governing student conduct and discipline and are directed to make available codes of student conduct. § 230.23 (6). Teachers and principals are given immunity from civil and criminal liability for enforcing disciplinary rules, "[e]xcept in the case of excessive force or cruel and unusual punishment . . . ." § 232.275.

[7] In the 1970–1971 school year, Policy 5144 authorized corporal punishment where the failure of other means of seeking cooperation from the student made its use necessary. The regulation specified that the principal should determine the necessity for corporal punishment, that the student should understand the seriousness of the offense and the reason for the punishment, and that the punishment should be administered in the presence of another adult in circumstances not calculated to hold the student up to shame or ridicule. The regulation cautioned against using corporal punishment against a student under psychological or medical treatment, and warned that the person administering the punishment "must realize his own personal liabilities" in any case of physical injury. App. 15.

While this litigation was pending in the District Court, the Dade County School Board amended Policy 5144 to standardize the size of the paddles used in accordance with the description in the text, to proscribe striking a child with a paddle elsewhere than on the buttocks, to limit the permissible number of "licks" (five for elementary and intermediate grades and seven for junior and senior grades), and to require a contemporaneous explanation of the need for the punishment to the student and a subsequent notification to the parents. App. 126–128.

no apparent physical injury to the student. School authorities viewed corporal punishment as a less drastic means of discipline than suspension or expulsion. Contrary to the procedural requirements of the statute and regulation, teachers often paddled students on their own authority without first consulting the principal.[8]

Petitioners focused on Drew Junior High School, the school in which both Ingraham and Andrews were enrolled in the fall of 1970. In an apparent reference to Drew, the District Court found that "[t]he instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school." App. 147. The evidence, consisting mainly of the testimony of 16 students, suggests that the regime at Drew was exceptionally harsh. The testimony of Ingraham and Andrews, in support of their individual claims for damages, is illustrative. Because he was slow to respond to his teacher's instructions, Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma[9] requiring medical attention and keeping him out of school for several days.[10] Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week.[11]

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[8] 498 F. 2d 248, 255, and n. 7 (1974) (original panel opinion), vacated on rehearing, 525 F. 2d 909 (1976); App. 48, 138, 146; Exhibits 14, 15.

[9] Stedman's Medical Dictionary (23d ed. 1976) defines "hematoma" as "[a] localized mass of extravasated blood that is relatively or completely confined within an organ or tissue . . . ; the blood is usually clotted (or partly clotted), and, depending on how long it has been there, may manifest various degrees of organization and decolorization."

[10] App. 3–4, 18–20, 68–85, 129–136.

[11] *Id.*, at 4–5, 104–113. The similar experiences of several other students at Drew, to which they individually testified in the District Court, are summarized in the original panel opinion in the Court of Appeals, 498 F. 2d, at 257–259.

The District Court made no findings on the credibility of the students' testimony. Rather, assuming their testimony to be credible, the court found no constitutional basis for relief. With respect to count three, the class action, the court concluded that the punishment authorized and practiced generally in the county schools violated no constitutional right. *Id.*, at 143, 149. With respect to counts one and two, the individual damages actions, the court concluded that while corporal punishment could in some cases violate the Eighth Amendment, in this case a jury could not lawfully find "the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment.'" *Id.*, at 143.

A panel of the Court of Appeals voted to reverse. 498 F. 2d 248 (CA5 1974). The panel concluded that the punishment was so severe and oppressive as to violate the Eighth and Fourteenth Amendments, and that the procedures outlined in Policy 5144 failed to satisfy the requirements of the Due Process Clause. Upon rehearing, the en banc court rejected these conclusions and affirmed the judgment of the District Court. 525 F. 2d 909 (1976). The full court held that the Due Process Clause did not require notice or an opportunity to be heard:

> "In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough, on a constitutional level, to justify the time and effort which would have to be expended by the school in adhering to those procedures or to justify further interference by federal courts into the internal affairs of public schools." *Id.*, at 919.

The court also rejected the petitioners' substantive contentions. The Eighth Amendment, in the court's view, was simply inapplicable to corporal punishment in public

schools. Stressing the likelihood of civil and criminal liability in state law, if petitioners' evidence were believed, the court held that "[t]he administration of corporal punishment in public schools, whether or not excessively administered, does not come within the scope of Eighth Amendment protection." *Id.*, at 915. Nor was there any substantive violation of the Due Process Clause. The court noted that "[p]addling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children." *Id.*, at 917. The court refused to examine instances of punishment individually:

> "We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. . . ." *Ibid.*

We granted certiorari, limited to the questions of cruel and unusual punishment and procedural due process. 425 U. S. 990.[12]

II

In addressing the scope of the Eighth Amendment's prohibition on cruel and unusual punishment, this Court has found it useful to refer to "[t]raditional common-law concepts," *Powell* v. *Texas*, 392 U. S. 514, 535 (1968) (plurality opinion), and to the "attitude[s] which our society has traditionally taken." *Id.*, at 531. So, too, in defining the require-

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[12] We denied review of a third question presented in the petition for certiorari:

"Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?" Pet. for Cert. 2.

ments of procedural due process under the Fifth and Fourteenth Amendments, the Court has been attuned to what "has always been the law of the land," *United States* v. *Barnett*, 376 U. S. 681, 692 (1964), and to "traditional ideas of fair procedure." *Greene* v. *McElroy*, 360 U. S. 474, 508 (1959). We therefore begin by examining the way in which our traditions and our laws have responded to the use of corporal punishment in public schools.

The use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period.[13] It has survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools.[14] Despite the general abandonment of corporal punishment as a means of punishing criminal offenders,[15] the practice continues to play a role in the public education of schoolchildren in most parts of the country.[16] Professional and public opinion is sharply divided on the practice,[17] and has been for more than

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[13] See H. Falk, Corporal Punishment 11–48 (1941); N. Edwards & H. Richey, The School in the American Social Order 115–116 (1947).

[14] Public and compulsory education existed in New England before the Revolution, see *id.*, at 50–68, 78–81, 97–113, but the demand for free public schools as we now know them did not gain momentum in the country as a whole until the mid-1800's, and it was not until 1918 that compulsory school attendance laws were in force in all the States. See *Brown* v. *Board of Education*, 347 U. S. 483, 489 n. 4 (1954), citing Cubberley, Public Education in the United States 408–423, 563–565 (1934 ed.); cf. *Wisconsin* v. *Yoder*, 406 U. S. 205, 226, and n. 15 (1972).

[15] See *Jackson* v. *Bishop*, 404 F. 2d 571, 580 (CA8 1968); Falk, *supra*, at 85–88.

[16] See K. Larson & M. Karpas, Effective Secondary School Discipline 146 (1963); A. Reitman, J. Follman, & E. Ladd, Corporal Punishment in the Public Schools 2–5 (ACLU Report 1972).

[17] For samplings of scholarly opinion on the use of corporal punishment in the schools, see F. Reardon & R. Reynolds, Corporal Punishment in

a century.[18] Yet we can discern no trend toward its elimination.

At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child.[19] Blackstone catalogued among the "absolute rights of individuals" the right "to security from the corporal insults of menaces, assaults, beating, and wounding," 1 W. Blackstone, Commentaries *134, but he did not regard it a "corporal insult" for a teacher to inflict "moderate correction" on a child in his care. To the extent that force was "necessary to answer the purposes for which [the teacher] is employed," Blackstone viewed it as "justifiable or lawful." *Id.*, at *453; 3 *id.*, at *120. The basic doctrine has not changed. The prevalent rule in this country today privileges such force as a teacher or administrator "reasonably believes to be necessary for [the child's] proper control, training, or education." Restatement (Second) of Torts § 147 (2) (1965); see *id.*, § 153 (2). To the extent that the force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability.[20]

Pennsylvania 1–2, 34 (1975); National Education Association, Report of the Task Force on Corporal Punishment (1972); K. James, Corporal Punishment in the Public Schools 8–16 (1963). Opinion surveys taken since 1970 have consistently shown a majority of teachers and of the general public favoring moderate use of corporal punishment in the lower grades. See Reardon & Reynolds, *supra*, at 2, 23–26; Delaware Department of Public Instruction, Report on the Corporal Punishment Survey 48 (1974); Reitman, Follman, & Ladd, *supra*, at 34–35; National Education Association, *supra*, at 7.

[18] See Falk, *supra*, 66–69; cf. *Cooper* v. *McJunkin*, 4 Ind. 290 (1853).

[19] See 1 F. Harper & F. James, Law of Torts § 3.20, pp. 288–292 (1956); Proehl, Tort Liability of Teachers, 12 Vand. L. Rev. 723, 734–738 (1959); W. Prosser, Law of Torts 136–137 (4th ed. 1971).

[20] See cases cited n. 28, *infra*. The criminal codes of many States include provisions explicitly recognizing the teacher's common-law privilege

Although the early cases viewed the authority of the teacher as deriving from the parents,[21] the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary "for the proper education of the child and for the maintenance of group discipline." 1 F. Harper & F. James, Law of Torts § 3.20, p. 292 (1956).[22] All of the circumstances are to be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline. *Id.*, at 290–291; Restatement (Second) of Torts § 150, Comments *c–e*, p. 268 (1965).

Of the 23 States that have addressed the problem through legislation, 21 have authorized the moderate use of corporal punishment in public schools.[23] Of these States only a few

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to inflict reasonable corporal punishment. *E. g.*, Ariz. Rev. Stat. Ann. § 13-246 (A)(1) (1956); Conn. Gen. Stat. § 53a-18 (1977); Neb. Rev. Stat. § 28-840 (2) (1975); N. Y. Penal Law § 35.10 (McKinney 1975 and Supp. 1976); Ore. Rev. Stat. § 161.205 (1) (1975).

[21] See Proehl, *supra*, at 726, and n. 13.

[22] Today, corporal punishment in school is conditioned on parental approval only in California. Cal. Educ. Code § 49001 (West Supp. 1977). Cf. *Morrow* v. *Wood*, 35 Wis. 59 (1874). This Court has held in a summary affirmance that parental approval of corporal punishment is not constitutionally required. *Baker* v. *Owen*, 423 U. S. 907 (1975), aff'g 395 F. Supp. 294 (MDNC).

[23] Cal. Educ. Code §§ 49000–49001 (West Supp. 1977); Del. Code Ann., Tit. 14, § 701 (Supp. 1976); Fla. Stat. Ann. § 232.27 (1977); Ga. Code Ann. §§ 32-835, 32-836 (1976); Haw. Rev. Stat. §§ 298-16 (1975 Supp.), 703-309 (2) (Spec. Pamphlet 1975); Ill. Ann. Stat., c. 122, §§ 24-24, 34-84a (1977 Supp.); Ind. Code Ann. § 20-8.1-5-2 (1975); Md. Ann. Code, Art. 77, § 98B (1975) (in specified counties); Mich. Comp. Laws Ann., § 340.756

have elaborated on the common-law test of reasonableness, typically providing for approval or notification of the child's parents,[24] or for infliction of punishment only by the principal [25] or in the presence of an adult witness.[26] Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools.[27] Where the legislatures have not acted, the state courts have uniformly preserved the common-law rule permitting teachers to use reasonable force in disciplining children in their charge.[28]

Against this background of historical and contemporary approval of reasonable corporal punishment, we turn to the constitutional questions before us.

(1970); Mont. Rev. Codes Ann. § 75–6109 (1971); Nev. Rev. Stat. § 392.465 (1973); N. C. Gen. Stat. § 115–146 (1975); Ohio Rev. Code Ann. § 3319.41 (1972); Okla. Stat. Ann., Tit. 70, § 6–114 (1972); Pa. Stat. Ann., Tit. 24, § 13–1317 (Supp. 1976); S. C. Code § 59–63–260 (1977); S. D. Compiled Laws Ann. § 13–32–2 (1975); Vt. Stat. Ann., Tit. 16, § 1161 (Supp. 1976); Va. Code Ann. § 22–231.1 (1973); W. Va. Code, § 18A–5–1 (1977); Wyo. Stat. § 21.1–64 (Supp. 1975).

[24] Cal. Educ. Code § 49001 (West Supp. 1977) (requiring prior parental approval in writing); Fla. Stat. Ann. § 232.27 (3) (1977) (requiring a written explanation on request); Mont. Rev. Codes Ann. § 75–6109 (1971) (requiring prior parental notification).

[25] Md. Ann. Code, Art. 77, § 98B (1975).

[26] Fla. Stat. Ann. § 232.27 (1977); Haw. Rev. Stats. § 298–16 (1975 Supp.); Mont. Rev. Codes Ann. § 75–6109 (1971).

[27] Mass. Gen. Laws Ann., c. 71, § 37G (Supp. 1976); N. J. Stat. Ann. § 18A: 6–1 (1968).

[28] *E. g., Suits* v. *Glover*, 260 Ala. 449, 71 So. 2d 49 (1954); *La Frentz* v. *Gallagher*, 105 Ariz. 255, 462 P. 2d 804 (1969); *Berry* v. *Arnold School Dist.*, 199 Ark. 1118, 137 S. W. 2d 256 (1940); *Andreozzi* v. *Rubano*, 145 Conn. 280, 141 A. 2d 639 (1958); *Tinkham* v. *Kole*, 252 Iowa 1303, 110 N. W. 2d 258 (1961); *Carr* v. *Wright*, 423 S. W. 2d 521 (Ky. 1968); *Christman* v. *Hickman*, 225 Mo. App. 828, 37 S. W. 2d 672 (1931); *Simms* v. *School Dist. No. 1*, 13 Ore. App. 119, 508 P. 2d 236 (1973); *Marlar* v. *Bill*, 181 Tenn. 100, 178 S. W. 2d 634 (1944); *Prendergast* v. *Masterson*, 196 S. W. 246 (Tex. Civ. App. 1917). See generally sources cited n. 19, *supra*.

III

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this long-standing limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.

A

The history of the Eighth Amendment is well known.[29] The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689. The English version, adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II. Historians have viewed the English provision as a reaction either to the "Bloody Assize," the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth,[30] or to the perjury prosecution of Titus Oates in the same year.[31] In

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[29] See *Gregg* v. *Georgia*, 428 U. S. 153, 168–173 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.) (hereinafter joint opinion); *Furman* v. *Georgia*, 408 U. S. 238, 316–328 (1972) (MARSHALL, J., concurring); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969).

[30] See I. Brant, The Bill of Rights 155 (1965).

[31] See Granucci, *supra*, at 852–860.

either case, the exclusive concern of the English version was the conduct of judges in enforcing the criminal law. The original draft introduced in the House of Commons provided: [32]

> "The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented."

Although the reference to "criminal cases" was eliminated from the final draft, the preservation of a similar reference in the preamble [33] indicates that the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments.[34]

The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured. *Weems* v. *United States*, 217 U. S. 349, 371–373 (1910). Indeed, the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. *In re Kemmler*, 136 U. S. 436, 446–447 (1890);

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[32] *Id.*, at 855.

[33] The preamble reads in part:

"WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this kingdom.

. . .

"10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

"11. And excessive fines have been imposed; and illegal and cruel punishments inflicted. . . ." R. Perry & J. Cooper, Sources of Our Liberties 245–246 (1959).

[34] 4 W. Blackstone, Commentaries *297 (bail), *379 (fines and other punishments).

Furman v. *Georgia*, 408 U. S. 238, 263 (1972) (BRENNAN, J., concurring). But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply—the criminal process—was the same.

At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes.[35] This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights. When the Eighth Amendment was debated in the First Congress, it was met by the objection that the Cruel and Unusual Punishments Clause might have the effect of outlawing what were then the common criminal punishments of hanging, whipping, and earcropping. 1 Annals of Cong. 754 (1789). The objection was not heeded, "precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes." *Furman* v. *Georgia*, *supra*, at 263.

B

In light of this history, it is not surprising to find that every decision of this Court considering whether a punishment is "cruel and unusual" within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment.

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[35] Abraham Holmes of Massachusetts complained specifically of the absence of a provision restraining Congress in its power to determine "what kind of punishments shall be inflicted on persons convicted of crimes." 2 J. Elliot, Debates on the Federal Constitution 111 (1876). Patrick Henry was of the same mind:

"What says our [Virginia] bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. . . ." 3 *id.*, at 447.

See *Estelle* v. *Gamble*, 429 U. S. 97 (1976) (incarceration without medical care); *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (execution for murder); *Furman* v. *Georgia*, *supra* (execution for murder); *Powell* v. *Texas*, 392 U. S. 514 (1968) (plurality opinion) ($20 fine for public drunkenness); *Robinson* v. *California*, 370 U. S. 660 (1962) (incarceration as a criminal for addiction to narcotics); *Trop* v. *Dulles*, 356 U. S. 86 (1958) (plurality opinion) (expatriation for desertion); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947) (execution by electrocution after a failed first attempt); *Weems* v. *United States*, *supra* (15 years' imprisonment and other penalties for falsifying an official document); *Howard* v. *Fleming*, 191 U. S. 126 (1903) (10 years' imprisonment for conspiracy to defraud); *In re Kemmler*, *supra* (execution by electrocution); *Wilkerson* v. *Utah*, 99 U. S. 130 (1879) (execution by firing squad); *Pervear* v. *Commonwealth*, 5 Wall. 475 (1867) (fine and imprisonment at hard labor for bootlegging).

These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes, *e. g.*, *Estelle* v. *Gamble*, *supra*; *Trop* v. *Dulles*, *supra*; second, it proscribes punishment grossly disproportionate to the severity of the crime, *e. g.*, *Weems* v. *United States*, *supra*; and third, it imposes substantive limits on what can be made criminal and punished as such, *e. g.*, *Robinson* v. *California*, *supra*. We have recognized the last limitation as one to be applied sparingly. "The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . ." *Powell* v. *Texas*, *supra*, at 531–532 (plurality opinion).

In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no diffi-

culty finding the Eighth Amendment inapplicable. Thus, in *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893), the Court held the Eighth Amendment inapplicable to the deportation of aliens on the ground that "deportation is not a punishment for crime." *Id.*, at 730; see *Mahler* v. *Eby*, 264 U. S. 32 (1924); *Bugajewitz* v. *Adams*, 228 U. S. 585 (1913). And in *Uphaus* v. *Wyman*, 360 U. S. 72 (1959), the Court sustained a judgment of civil contempt, resulting in incarceration pending compliance with a subpoena, against a claim that the judgment imposed cruel and unusual punishment. It was emphasized that the case involved " 'essentially a civil remedy designed for the benefit of other parties . . . exercised for centuries to secure compliance with judicial decrees.' " *Id.*, at 81, quoting *Green* v. *United States*, 356 U. S. 165, 197 (1958) (dissenting opinion).[36]

C

Petitioners acknowledge that the original design of the Cruel and Unusual Punishments Clause was to limit criminal punishments, but urge nonetheless that the prohibition should be extended to ban the paddling of schoolchildren. Observing that the Framers of the Eighth Amendment could not have envisioned our present system of public and compulsory education, with its opportunities for noncriminal punishments, petitioners contend that extension of the prohibition against cruel punishments is necessary lest we afford greater protec-

[36] In urging us to extend the Eighth Amendment to ban school paddlings, petitioners rely on the many decisions in which this Court has held that the prohibition against "cruel and unusual" punishments is not " 'fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' " *Gregg* v. *Georgia*, 428 U. S., at 171 (joint opinion); see, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349, 373, 378 (1910). This reliance is misplaced. Our Eighth Amendment decisions have referred to "evolving standards of decency," *Trop* v. *Dulles*, *supra*, at 101, only in determining whether criminal punishments are "cruel and unusual" under the Amendment.

tion to criminals than to schoolchildren. It would be anomalous, they say, if schoolchildren could be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment. See *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968); cf. *Estelle* v. *Gamble*, *supra*. Whatever force this logic may have in other settings,[37] we find it an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools.

The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972); see *Meachum* v. *Fano*, 427 U. S. 215, 224–225 (1976). Prison brutality, as the Court of Appeals observed in this case, is "part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." 525 F. 2d, at 915.[38] Even so, the protection af-

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[37] Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. Cf. *In re Gault*, 387 U. S. 1 (1967). We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.

[38] Judge Friendly similarly has observed that the Cruel and Unusual Punishments Clause "can fairly be deemed to be applicable to the manner in which an otherwise constitutional sentence . . . is carried out by an executioner, see Louisiana ex rel. Francis v. Resweber, 329 U. S. 459 . . . (1947), or to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment." *Johnson* v. *Glick*, 481 F. 2d 1028, 1032 (CA2), cert. denied, 414 U. S. 1033 (1973) (citation omitted).

forded by the Eighth Amendment is limited. After incarceration, only the "'unnecessary and wanton infliction of pain,'" *Estelle* v. *Gamble*, 429 U. S., at 103, quoting *Gregg* v. *Georgia*, 428 U. S., at 173, constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law. Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability. See Part II, *supra*. As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged in this case.[39]

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[39] Putting history aside as irrelevant, the dissenting opinion of MR. JUSTICE WHITE argues that a "purposive analysis" should control the reach of the Eighth Amendment. *Post*, at 686–688. There is no support whatever for this approach in the decisions of this Court. Although an imposition must be "punishment" for the Cruel and Unusual Punishments Clause to apply, the Court has never held that *all* punishments are subject to Eighth Amendment scrutiny. See n. 40, *infra*. The ap-

We conclude that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable. The pertinent constitutional question is whether the imposition is consonant with the requirements of due process.[40]

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plicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation. See *Gregg* v. *Georgia*, 428 U. S., at 169–173 (joint opinion); *Furman* v. *Georgia*, 408 U. S., at 315–328 (MARSHALL, J., concurring).

The dissenting opinion warns that as a consequence of our decision today, teachers may "cut off a child's ear for being late to class." *Post*, at 684. This rhetoric bears no relation to reality or to the issues presented in this case. The laws of virtually every State forbid the excessive physical punishment of schoolchildren. Yet the logic of the dissent would make the judgment of which disciplinary punishments are reasonable and which are excessive a matter of constitutional principle in every case, to be decided ultimately by this Court. The hazards of such a broad reading of the Eighth Amendment are clear. "It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." *Powell* v. *Texas*, 392 U. S. 514, 547–548 (1968) (opinion of Black, J.).

[40] Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. See *United States* v. *Lovett*, 328 U. S. 303, 317–318 (1946). Thus, in *Trop* v. *Dulles*, 356 U. S. 86 (1958), the plurality appropriately took the view that denationalization was an impermissible punishment for wartime desertion under the Eighth Amendment, because desertion already had been established at a criminal trial. But in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), where the Court considered denationalization as a punishment for evading the draft, the Court refused to reach the Eighth Amendment issue, holding instead that the punishment could be imposed only through the criminal process. *Id.*, at 162–167, 186, and n. 43. As these cases demonstrate, the State does not acquire the power to punish with which the Eighth Amendment is concerned until after

IV

The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, we then must decide what procedures constitute "due process of law." *Morrissey* v. *Brewer*, 408 U. S., at 481; *Board of Regents* v. *Roth*, 408 U. S. 564, 569–572 (1972). See Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). Following that analysis here, we find that corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process.

A

"[T]he range of interests protected by procedural due process is not infinite." *Board of Regents* v. *Roth*, *supra*, at 570. We have repeatedly rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum* v. *Fano*, 427 U. S., at 224. Due process is required only when a decision of the State implicates an interest within the protection of the Fourteenth Amendment. And "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Roth*, *supra*, at 570–571.

The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Ameri-

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it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

cans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923); see *Dent* v. *West Virginia*, 129 U. S. 114, 123–124 (1889). Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.[41]

While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely,[42] they always have been thought to encom-

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[41] See 1 W. Blackstone, Commentaries *134. Under the 39th Article of the Magna Carta, an individual could not be deprived of this right of personal security "except by the legal judgment of his peers or by the law of the land." Perry & Cooper, *supra*, n. 33, at 17. By subsequent enactments of Parliament during the time of Edward III, the right was protected from deprivation except "by due process of law." See Shattuck, The True Meaning of the Term "Liberty," 4 Harv. L. Rev. 365, 372–373 (1891).

[42] See, *e. g.*, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942) (sterilization); *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251–252 (1891) (physical examinations); cf. *ICC* v. *Brimson*, 154 U. S. 447, 479 (1894).

The right of personal security is also protected by the Fourth Amendment, which was made applicable to the States through the Fourteenth because its protection was viewed as "implicit in 'the concept of ordered liberty' . . . enshrined in the history and the basic constitutional documents of English-speaking peoples." *Wolf* v. *Colorado*, 338 U. S. 25, 27–28 (1949). It has been said of the Fourth Amendment that its "overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U. S. 757, 767 (1966). But the principal concern of that Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. See *Whalen* v. *Roe*, 429 U. S. 589, 604 n. 32 (1977). Petitioners do not contend that the Fourth Amendment applies, according to its terms, to corporal punishment in public school.

pass freedom from bodily restraint and punishment. See *Rochin* v. *California*, 342 U. S. 165 (1952). It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.

This constitutionally protected liberty interest is at stake in this case. There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.[43]

B

"[T]he question remains what process is due." *Morrissey* v. *Brewer*, *supra*, at 481. Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed.[44] But here we deal with a punishment—paddling—within that tra-

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[43] Unlike *Goss* v. *Lopez*, 419 U. S. 565 (1975), this case does not involve the state-created property interest in public education. The purpose of corporal punishment is to correct a child's behavior without interrupting his education. That corporal punishment may, in a rare case, have the unintended effect of temporarily removing a child from school affords no basis for concluding that the practice itself deprives students of property protected by the Fourteenth Amendment.

Nor does this case involve any state-created interest in liberty going beyond the Fourteenth Amendment's protection of freedom from bodily restraint and corporal punishment. Cf. *Meachum* v. *Fano*, 427 U. S. 215, 225–227 (1976).

[44] If the common-law privilege to inflict reasonable corporal punishment in school were inapplicable, it is doubtful whether any procedure short of a trial in a criminal or juvenile court could satisfy the requirements of procedural due process for the imposition of such punishment. See *United States* v. *Lovett*, 328 U. S., at 317–318; cf. *Breed* v. *Jones*, 421 U. S. 519, 528–529 (1975).

dition, and the question is whether the common-law remedies are adequate to afford due process.

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ." *Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 162–163 (1951) (Frankfurter, J., concurring).

Whether in this case the common-law remedies for excessive corporal punishment constitute due process of law must turn on an analysis of the competing interests at stake, viewed against the background of "history, reason, [and] the past course of decisions." The analysis requires consideration of three distinct factors: "First, the private interest that will be affected . . . ; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). Cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 167–168 (1974) (POWELL, J., concurring).

1

Because it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations. Under the common law, an invasion of personal security gave rise to a right to recover damages in a subsequent judicial proceeding. 3 W. Blackstone, Commentaries *120–121. But the right of recovery was qualified by the concept of justification. Thus, there could be no recovery against a teacher who gave only "moderate correction" to a child. *Id.*, at *120. To the

extent that the force used was reasonable in light of its purpose, it was not wrongful, but rather "justifiable or lawful." *Ibid.*

The concept that reasonable corporal punishment in school is justifiable continues to be recognized in the laws of most States. See Part II, *supra*. It represents "the balance struck by this country," *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting), between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education. Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege.

This is not to say that the child's interest in procedural safeguards is insubstantial. The school disciplinary process is not "a totally accurate, unerring process, never mistaken and never unfair. . . ." *Goss* v. *Lopez*, 419 U. S. 565, 579–580 (1975). In any deliberate infliction of corporal punishment on a child who is restrained for that purpose, there is some risk that the intrusion on the child's liberty will be unjustified and therefore unlawful. In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification.

We turn now to a consideration of the safeguards that are available under applicable Florida law.

2

Florida has continued to recognize, and indeed has strengthened by statute, the common-law right of a child not to be subjected to excessive corporal punishment in school. Under Florida law the teacher and principal of the school decide in the first instance whether corporal punishment is reasonably necessary under the circumstances in order to discipline

a child who has misbehaved. But they must exercise prudence and restraint. For Florida has preserved the traditional judicial proceedings for determining whether the punishment was justified. If the punishment inflicted is later found to have been excessive—not reasonably believed at the time to be necessary for the child's discipline or training—the school authorities inflicting it may be held liable in damages to the child and, if malice is shown, they may be subject to criminal penalties.[45]

Although students have testified in this case to specific instances of abuse, there is every reason to believe that such mistreatment is an aberration. The uncontradicted evidence suggests that corporal punishment in the Dade County schools was, "[w]ith the exception of a few cases, . . . unremarkable in physical severity." App. 147. Moreover, because paddlings are usually inflicted in response to conduct directly

[45] See *supra*, at 655–657, 661. The statutory prohibition against "degrading" or unnecessarily "severe" corporal punishment in former § 232.27 has been construed as a statement of the common-law principle. See 1937 Op. Fla. Atty. Gen., Biennial Report of the Atty. Gen. 169 (1937–1938); cf. 1957 Op. Fla. Atty. Gen., Biennial Report of the Atty. Gen. 7, 8 (1957–1958). Florida Stat. Ann. § 827.03 (3) (1976) makes malicious punishment of a child a felony. Both the District Court, App. 144, and the Court of Appeals, 525 F. 2d, at 915, expressed the view that the common-law tort remedy was available to the petitioners in this case. And petitioners conceded in this Court that a teacher who inflicts excessive punishment on a child may be held both civilly and criminally liable under Florida law. Brief for Petitioners 33 n. 11, 34; Tr. of Oral Arg. 17, 52–53.

In view of the statutory adoption of the common-law rule, and the unanimity of the parties and the courts below, the doubts expressed in MR. JUSTICE WHITE'S dissenting opinion as to the availability of tort remedies in Florida can only be viewed as chimerical. The dissent makes much of the fact that no Florida court has ever "recognized" a damages remedy for unreasonable corporal punishment. *Post*, at 694 n. 11, 700. But the absence of reported Florida decisions hardly suggests that no remedy is available. Rather, it merely confirms the commonsense judgment that excessive corporal punishment is exceedingly rare in the public schools.

observed by teachers in their presence, the risk that a child will be paddled without cause is typically insignificant. In the ordinary case, a disciplinary paddling neither threatens seriously to violate any substantive rights nor condemns the child "to suffer grievous loss of any kind." *Anti-Fascist Comm.* v. *McGrath*, 341 U. S., at 168 (Frankfurter, J., concurring).

In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse—considered in light of the openness of the school environment—afford significant protection against unjustified corporal punishment. See *supra*, at 670. Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them.[46]

It still may be argued, of course, that the child's liberty interest would be better protected if the common-law remedies were supplemented by the administrative safeguards of prior notice and a hearing. We have found frequently that some kind of prior hearing is necessary to guard against arbitrary impositions on interests protected by the Fourteenth Amend-

[46] The low incidence of abuse, and the availability of established judicial remedies in the event of abuse, distinguish this case from *Goss* v. *Lopez*, 419 U. S. 565 (1975). The Ohio law struck down in *Goss* provided for suspensions from public school of up to 10 days without "any written procedure applicable to suspensions." *Id.*, at 567. Although Ohio law provided generally for administrative review, Ohio Rev. Code Ann. § 2506.01 (Supp. 1973), the Court assumed that the short suspensions would not be stayed pending review, with the result that the review proceeding could serve neither a deterrent nor a remedial function. 419 U. S., at 581 n. 10. In these circumstances, the Court held the law authorizing suspensions unconstitutional for failure to require "that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension . . . ." *Id.*, at 584. The subsequent civil and criminal proceedings available in this case may be viewed as affording substantially greater protection to the child than the informal conference mandated by *Goss*.

ment. See, *e. g., Board of Regents* v. *Roth*, 408 U. S., at 569–570; *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974); cf. Friendly, 123 U. Pa. L. Rev., at 1275–1277. But where the State has preserved what "has always been the law of the land," *United States* v. *Barnett*, 376 U. S. 681 (1964), the case for administrative safeguards is significantly less compelling.[47]

There is a relevant analogy in the criminal law. Although the Fourth Amendment specifically proscribes "seizure" of a person without probable cause, the risk that police will act unreasonably in arresting a suspect is not thought to require an advance determination of the facts. In *United States* v. *Watson*, 423 U. S. 411 (1976), we reaffirmed the traditional common-law rule that police officers may make warrantless public arrests on probable cause. Although we observed that an advance determination of probable cause by a magistrate would be desirable, we declined "to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause . . . ." *Id.*, at 423; see *id.*, at 429 (POWELL, J., concurring). Despite the distinct possibility that a police officer may improperly assess the facts and thus unconstitutionally deprive an individual of

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[47] "[P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law." Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 431 (1977) (footnote omitted). See *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1319 (CA7 1975), modified en banc, 545 F. 2d 565 (1976), cert. pending, No. 76–6204.

We have no occasion in this case, see *supra*, at 659, and n. 12, to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause.

liberty, we declined to depart from the traditional rule by which the officer's perception is subjected to judicial scrutiny only after the fact.[48] There is no more reason to depart from tradition and require advance procedural safeguards for intrusions on personal security to which the Fourth Amendment does not apply.

3

But even if the need for advance procedural safeguards were clear, the question would remain whether the incremental benefit could justify the cost. Acceptance of petitioners' claims would work a transformation in the law governing corporal punishment in Florida and most other States. Given the impracticability of formulating a rule of procedural due process that varies with the severity of the particular imposition,[49] the prior hearing petitioners seek would have to precede *any* paddling, however moderate or trivial.

Such a universal constitutional requirement would significantly burden the use of corporal punishment as a disciplinary measure. Hearings—even informal hearings—require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements. Teachers, properly concerned with maintaining authority in the classroom, may well prefer to rely on other disciplinary measures—which they may view as less effective—rather than confront the

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[48] See also *Terry* v. *Ohio*, 392 U. S. 1 (1968). The reasonableness of a warrantless public arrest may be subjected to subsequent judicial scrutiny in a civil action against the law enforcement officer or in a suppression hearing to determine whether any evidence seized in the arrest may be used in a criminal trial.

[49] "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. . . ." *Mathews* v. *Eldridge*, 424 U. S. 319, 344 (1976).

possible disruption that prior notice and a hearing may entail.[50] Paradoxically, such an alteration of disciplinary policy is most likely to occur in the ordinary case where the contemplated punishment is well within the common-law privilege.[51]

Elimination or curtailment of corporal punishment would be welcomed by many as a societal advance. But when such a policy choice may result from this Court's determination of an asserted right to due process, rather than from the normal processes of community debate and legislative action, the societal costs cannot be dismissed as insubstantial.[52] We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests. This judgment must be viewed in light of the disciplinary problems commonplace in the schools. As noted in *Goss* v. *Lopez*, 419 U. S., at 580: "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." [53] As-

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[50] If a prior hearing, with the inevitable attendant publicity within the school, resulted in rejection of the teacher's recommendation, the consequent impairment of the teacher's ability to maintain discipline in the classroom would not be insubstantial.

[51] The effect of interposing prior procedural safeguards may well be to make the punishment more severe by increasing the anxiety of the child. For this reason, the school authorities in Dade County found it desirable that the punishment be inflicted as soon as possible after the infraction. App. 48–49.

[52] "It may be true that procedural regularity in disciplinary proceedings promotes a sense of institutional rapport and open communication, a perception of fair treatment, and provides the offender and his fellow students a showcase of democracy at work. But . . . [r]espect for democratic institutions will equally dissipate if they are thought too ineffectual to provide their students an environment of order in which the educational process may go forward. . . ." Wilkinson, Goss v. Lopez: The Supreme Court as School Superintendent, 1975 Sup. Ct. Rev. 25, 71–72.

[53] The seriousness of the disciplinary problems in the Nation's public schools has been documented in a recent congressional report, Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile Delin-

sessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 507 (1969).[54]

"At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews* v. *Eldridge*, 424 U. S., at 348. We think that point has been reached in this case. In view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility. We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.[55]

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quency, Challenge for the Third Century: Education in a Safe Environment—Final Report on the Nature and Prevention of School Violence and Vandalism, 95th Cong., 1st Sess. (Comm. Print 1977).

[54] The need to maintain order in a trial courtroom raises similar problems. In that context, this Court has recognized the power of the trial judge "to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him." *Taylor* v. *Hayes*, 418 U. S. 488, 497 (1974), citing *Ex parte Terry*, 128 U. S. 289 (1888). The punishment so imposed may be as severe as six months in prison. See *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 513–515 (1974); cf. *Muniz* v. *Hoffman*, 422 U. S. 454, 475–476 (1975).

[55] Mr. Justice White's dissenting opinion offers no manageable standards for determining what process is due in any particular case. The

V

Petitioners cannot prevail on either of the theories before us in this case. The Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to school paddlings, and the Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common-law constraints and remedies. We therefore agree with the Court of Appeals that petitioners' evidence affords no basis for injunctive relief, and that petitioners cannot recover damages on the basis of any Eighth Amendment or procedural due process violation.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

Today the Court holds that corporal punishment in public schools, no matter how severe, can never be the subject of the protections afforded by the Eighth Amendment. It also holds

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dissent apparently would require, as a general rule, only "an informal give-and-take between student and disciplinarian." *Post*, at 693. But the dissent would depart from these "minimal procedures"—requiring even witnesses, counsel, and cross-examination—in cases where the punishment reaches some undefined level of severity. *Post*, at 700 n. 18. School authorities are left to guess at the degree of punishment that will require more than an "informal give-and-take" and at the additional process that may be constitutionally required. The impracticality of such an approach is self-evident, and illustrates the hazards of ignoring the traditional solution of the common law.

We agree with the dissent that the *Goss* procedures will often be, "if anything, less than a fair-minded school principal would impose upon himself." *Post*, at 700, quoting *Goss*, 419 U. S., at 583. But before this Court invokes the Constitution to impose a procedural requirement, it should be reasonably certain that the effect will be to afford protection appropriate to the constitutional interests at stake. The dissenting opinion's reading of the Constitution suggests no such beneficial result and, indeed, invites a lowering of existing constitutional standards.

that students in the public school systems are not constitutionally entitled to a hearing of any sort before beatings can be inflicted on them. Because I believe that these holdings are inconsistent with the prior decisions of this Court and are contrary to a reasoned analysis of the constitutional provisions involved, I respectfully dissent.

I

A

The Eighth Amendment places a flat prohibition against the infliction of "cruel and unusual punishments." This reflects a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense. See *Robinson* v. *California*, 370 U. S. 660, 676 (1962) (Douglas, J., concurring). If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, *a fortiori*, similar punishments may not be imposed on persons for less culpable acts, such as breaches of school discipline. Thus, if it is constitutionally impermissible to cut off someone's ear for the commission of murder, it must be unconstitutional to cut off a child's ear for being late to class.[1] Although there were no ears cut off in this case, the

[1] There is little reason to fear that if the Eighth Amendment is held to apply *at all* to corporal punishment of schoolchildren, *all* paddlings, however moderate, would be prohibited. *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968), held that *any* paddling or flogging of prisoners, convicted of crime and serving prison terms, violated the cruel and unusual punishment ban of the Eighth Amendment. But aside from the fact that *Bishop* has never been embraced by this Court, the theory of that case was not that bodily punishments are intrinsically barbaric or excessively severe but that paddling of prisoners is "degrading to the punisher and to the punished alike." *Id.*, at 580. That approach may be acceptable in the criminal justice system, but it has little if any relevance to corporal

record reveals beatings so severe that if they were inflicted on a hardened criminal for the commission of a serious crime, they might not pass constitutional muster.

Nevertheless, the majority holds that the Eighth Amendment "was designed to protect [only] those convicted of crimes," *ante*, at 664, relying on a vague and inconclusive recitation of the history of the Amendment. Yet the constitutional prohibition is against cruel and unusual *punishments;* nowhere is that prohibition limited or modified by the language of the Constitution. Certainly, the fact that the Framers did not choose to insert the word "criminal" into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed.

No one can deny that spanking of schoolchildren is "punishment" under any reasonable reading of the word, for the similarities between spanking in public schools and other forms of punishment are too obvious to ignore. Like other forms of punishment, spanking of schoolchildren involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed

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punishment in the schools, for it can hardly be said that the use of moderate paddlings in the discipline of children is inconsistent with the country's evolving standards of decency.

On the other hand, when punishment involves a cruel, severe beating or chopping off an ear, something more than merely the dignity of the individual is involved. Whenever a given criminal punishment is "cruel and unusual" because it is inhumane or barbaric, I can think of no reason why it would be any less inhumane or barbaric when inflicted on a schoolchild, as punishment for classroom misconduct.

The issue in this case is whether spankings inflicted on public school children for breaking school rules is "punishment," not whether such punishment is "cruel and unusual." If the Eighth Amendment does not bar moderate spanking in public schools, it is because moderate spanking is not "cruel and unusual," not because it is not "punishment" as the majority suggests.

for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

B

We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process.[2] The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." *Ante*, at 666. The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. "[E]ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop* v. *Dulles*, 356 U. S. 86, 95 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated

[2] By no means is it suggested that just because spanking of schoolchildren is "punishment" within the meaning of the Cruel and Unusual Punishments Clause, the school disciplinary process is in any way "criminal" and therefore subject to the full panoply of criminal procedural guarantees. See Part II, *infra*. Ordinarily, the conduct for which schoolchildren are punished is not sufficiently opprobrious to be called "criminal" in our society, and even violations of school disciplinary rules that might also constitute a crime, see *infra*, at 688, are not subject to the criminal process. See *Baxter* v. *Palmigiano*, 425 U. S. 308 (1976), where the Court held that persons who violate prison disciplinary rules are not entitled to the full panoply of criminal procedural safeguards, even if the rule violation might also constitute a crime.

with punishment, such as retribution, rehabilitation, or deterrence.[3] *Id.*, at 96. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963).

If this purposive approach were followed in the present case, it would be clear that spanking in the Florida public schools is punishment within the meaning of the Eighth Amendment. The District Court found that "[c]orporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order." App. 146. Behavior correction and

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[3] The majority cites *Trop* as one of the cases that "dealt with a criminal punishment" but neglects to follow the analysis mandated by that decision. In *Trop* the petitioner was convicted of desertion by a military court-martial and sentenced to three years at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. After he was punished for the offense he committed, petitioner's application for a passport was turned down. Petitioner was told that he had been deprived of the "rights of citizenship" under § 401 (g) of the Nationality Act of 1940 because he had been dishonorably discharged from the Armed Forces. The plurality took the view that denationalization in this context was cruel and unusual punishment prohibited by the Eighth Amendment.

The majority would have us believe that the determinative factor in *Trop* was that the petitioner had been convicted of desertion; yet there is no suggestion in *Trop* that the disposition of the military court-martial had anything to do with the decision in that case. Instead, while recognizing that the Eighth Amendment extends only to punishments that are penal in nature, the plurality adopted a purposive approach for determining when punishment is penal.

"In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." 356 U. S., at 96 (footnotes omitted).

Although the quoted passage is taken from the plurality opinion of Mr. Chief Justice Warren, joined by three other Justices, MR. JUSTICE BRENNAN, in a concurring opinion, adopted a similar approach in concluding that § 401 (g) was beyond the power of Congress to enact.

preservation of order are purposes ordinarily associated with punishment.

Without even mentioning the purposive analysis applied in the prior decisions of this Court, the majority adopts a rule that turns on the label given to the offense for which the punishment is inflicted. Thus, the record in this case reveals that one student at Drew Junior High School received 50 licks with a paddle for allegedly making an obscene telephone call. Brief for Petitioners 13. The majority holds that the Eighth Amendment does not prohibit such punishment since it was only inflicted for a breach of school discipline. However, that same conduct is punishable as a misdemeanor under Florida law, Fla. Stat. Ann. § 365.16 (Supp. 1977), and there can be little doubt that if that same "punishment" had been inflicted by an officer of the state courts for violation of § 365.16, it would have had to satisfy the requirements of the Eighth Amendment.

C

In fact, as the Court recognizes, the Eighth Amendment has never been confined to criminal punishments.[4] Nevertheless, the majority adheres to its view that any protections afforded by the Eighth Amendment must have something to do with

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[4] *Ante*, at 669. In *Estelle* v. *Gamble*, 429 U. S. 97 (1976), a case decided this Term, the Court held that "deliberate indifference to the medical needs of prisoners" by prison officials constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Such deliberate indifference to a prisoner's medical needs clearly is not punishment inflicted for the commission of a crime; it is merely misconduct by a prison official. Similarly, the Eighth Circuit has held that whipping a prisoner with a strap in order to maintain discipline is prohibited by the Eighth Amendment. *Jackson* v. *Bishop*, 404 F. 2d 571 (1968) (Blackmun, J.). See also *Knecht* v. *Gillman*, 488 F. 2d 1136, 1139–1140 (CA8 1973) (injection of vomit-inducing drugs as part of aversion therapy held to be cruel and unusual); *Vann* v. *Scott*, 467 F. 2d 1235, 1240–1241 (CA7 1972) (Stevens, J.) (Eighth Amendment protects runaway children against cruel and inhumane treatment, regardless of whether such treatment is labeled "rehabilitation" or "punishment").

criminals, and it would therefore confine any exceptions to its general rule that only criminal punishments are covered by the Eighth Amendment to abuses inflicted on prisoners. Thus, if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to the protection of the Eighth Amendment, while a schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered.

The purported explanation of this anomaly is the assertion that schoolchildren have no need for the Eighth Amendment. We are told that schools are open institutions, subject to constant public scrutiny; that schoolchildren have adequate remedies under state law;[5] and that prisoners suffer the social stigma of being labeled as criminals. How any of these policy considerations got into the Constitution is difficult to discern, for the Court has never considered any of these factors in determining the scope of the Eighth Amendment.[6]

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[5] By finding that bodily punishment invades a constitutionally protected liberty interest within the meaning of the Due Process Clause, the majority suggests that the Clause might also afford a remedy for excessive spanking independently of the Eighth Amendment. If this were the case, the Court's present thesis would have little practical significance. If rather than holding that the Due Process Clause affords a remedy by way of the express commands of the Eighth Amendment, the majority would recognize a cause of action under 42 U. S. C. § 1983 for a deprivation of "liberty" flowing from an excessive paddling, the Court's opinion is merely a lengthy word of advice with respect to the drafting of civil complaints.

Petitioners in this case did raise the substantive due process issue in their petition for certiorari, *ante*, at 659 n. 12, but consideration of that question was foreclosed by our limited grant of certiorari. If it is probable that schoolchildren would be entitled to protection under some theory of substantive due process, the Court should not now affirm the judgment below, but should amend the grant of certiorari and set this case for reargument.

[6] In support of its policy considerations, the only cases from this Court cited by the majority are *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), and *Meachum* v. *Fano*, 427 U. S. 215 (1976), both cases involving prisoners' rights to procedural due process.

The essence of the majority's argument is that schoolchildren do not need Eighth Amendment protection because corporal punishment is less subject to abuse in the public schools than it is in the prison system.[7] However, it cannot be reasonably suggested that just because cruel and unusual punishments may occur less frequently under public scrutiny, they will not occur at all. The mere fact that a public flogging or a public execution would be available for all to see would not render the punishment constitutional if it were otherwise impermissible. Similarly, the majority would not suggest that a prisoner who is placed in a minimum-security prison and permitted to go home to his family on the weekends should be any less entitled to Eighth Amendment protections than his counterpart in a maximum-security prison. In short, if a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity.

Nor is it an adequate answer that schoolchildren may have other state and constitutional remedies available to them. Even assuming that the remedies available to public school students are adequate under Florida law,[8] the availability of state remedies has never been determinative of the coverage or of the protections afforded by the Eighth Amendment. The reason is obvious. The fact that a person may have a

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[7] There is no evidence in the record that corporal punishment has been abused in the prison systems more often than in the public schools. Indeed, corporal punishment is seldom authorized in state prisons. See *Jackson* v. *Bishop*, *supra*, at 580, where MR. JUSTICE (then Judge) BLACKMUN noted: "[O]nly two states still permit the use of the strap [in prisons]. Thus almost uniformly has it been abolished." By relying on its own view of the nature of these two public institutions, without any evidence being heard on the question below, the majority today predicates a constitutional principle on mere armchair speculation.

[8] There is some doubt that the state-law remedies available to public school children are adequate. See n. 11, *infra*.

state-law cause of action against a public official who tortures him with a thumbscrew for the commission of an antisocial act has nothing to do with the fact that such official conduct is cruel and unusual punishment prohibited by the Eighth Amendment. Indeed, the majority's view was implicitly rejected this Term in *Estelle* v. *Gamble*, 429 U. S. 97 (1976), when the Court held that failure to provide for the medical needs of prisoners could constitute cruel and unusual punishment even though a medical malpractice remedy in tort was available to prisoners under state law. *Id.*, at 107 n. 15.

D

By holding that the Eighth Amendment protects only criminals, the majority adopts the view that one is entitled to the protections afforded by the Eighth Amendment only if he is punished for acts that are sufficiently opprobrious for society to make them "criminal." This is a curious holding in view of the fact that the more culpable the offender the more likely it is that the punishment will not be disproportionate to the offense, and consequently, the less likely it is that the punishment will be cruel and unusual.[9] Conversely, a public school student who is spanked for a mere breach of discipline may sometimes have a strong argument that the punishment does not fit the offense, depending upon the severity of the beating, and therefore that it is cruel and unusual. Yet the majority would afford the student no protection no matter how inhumane and barbaric the punishment inflicted on him might be.

The issue presented in this phase of the case is limited to whether corporal punishment in public schools can *ever* be prohibited by the Eighth Amendment. I am therefore not

[9] For a penalty to be consistent with the Eighth Amendment "the punishment must not be grossly out of proportion to the severity of the crime." *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.).

suggesting that spanking in the public schools is in every instance prohibited by the Eighth Amendment. My own view is that it is not. I only take issue with the extreme view of the majority that corporal punishment in public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment. Where corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools.

II

The majority concedes that corporal punishment in the public schools implicates an interest protected by the Due Process Clause—the liberty interest of the student to be free from "bodily restraint and punishment" involving "appreciable physical pain" inflicted by persons acting under color of state law. *Ante*, at 674. The question remaining, as the majority recognizes, is what process is due.

The reason that the Constitution requires a State to provide "due process of law" when it punishes an individual for misconduct is to protect the individual from erroneous or mistaken punishment that the State would not have inflicted had it found the facts in a more reliable way. See, *e. g.*, *Mathews* v. *Eldridge*, 424 U. S. 319, 335, 344 (1976). In *Goss* v. *Lopez*, 419 U. S. 565 (1975), the Court applied this principle to the school disciplinary process, holding that a student must be given an informal opportunity to be heard before he is finally suspended from public school.

> "*Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others;* and the controlling facts and the nature of the conduct under challenge are often disputed. *The risk of error is not at all trivial,* and it should be guarded against if that may be done without prohibitive cost or interference

with the educational process." *Id.*, at 580. (Emphasis added.)

To guard against this risk of punishing an innocent child, the Due Process Clause requires, not an "elaborate hearing" before a neutral party, but simply "an informal give-and-take between student and disciplinarian" which gives the student "an opportunity to explain his version of the facts." *Id.*, at 580, 582, 584.

The Court now holds that these "rudimentary precautions against unfair or mistaken findings of misconduct," *id.*, at 581, are not required if the student is punished with "appreciable physical pain" rather than with a suspension, even though both punishments deprive the student of a constitutionally protected interest. Although the respondent school authorities provide absolutely *no* process to the student before the punishment is finally inflicted, the majority concludes that the student is nonetheless given due process because he can later sue the teacher and recover damages if the punishment was "excessive."

This tort action is utterly inadequate to protect against erroneous infliction of punishment for two reasons.[10] First, under Florida law, a student punished for an act he did not commit cannot recover damages from a teacher "proceeding

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[10] Here, as in *Goss* v. *Lopez*, 419 U. S. 565, 580–581, n. 9 (1975), the record suggests that there may be a substantial risk of error in the discipline administered by respondent school authorities. Respondents concede that some of the petitioners who were punished "denied misconduct" and that "in some cases the punishments may have been mistaken . . . ." Brief for Respondents 60–61. The Court of Appeals panel below noted numerous instances of students punished despite claims of innocence, 498 F. 2d 248, 256–258 (CA5 1974), and was "particularly disturbed by the testimony that whole classes of students were corporally punished for the misconduct of a few." *Id.*, at 268 n. 36. To the extent that the majority focuses on the incidence of and remedies for unduly severe punishments, it fails to address petitioners' claim that procedural safeguards are required to reduce the risk of punishments that are simply mistaken.

in utmost good faith . . . on the reports and advice of others," *supra*, at 692; the student has no remedy at all for punishment imposed on the basis of mistaken facts, at least as long as the punishment was reasonable from the point of view of the disciplinarian, uninformed by any prior hearing.[11] The "tra-

[11] The majority's assurances to the contrary, it is unclear to me whether and to what extent Florida law provides a damages action against school officials for excessive corporal punishment. Giving the majority the benefit of every doubt, I think it is fair to say that the most a student punished on the basis of mistaken allegations of misconduct can hope for in Florida is a recovery for unreasonable or bad-faith error. But I strongly suspect that even this remedy is not available.

Although the majority does not cite a single case decided under Florida law that recognizes a student's right to sue a school official to recover damages for excessive punishment, I am willing to assume that such a tort action does exist in Florida. I nevertheless have serious doubts about whether it would ever provide a recovery to a student simply because he was punished for an offense he did not commit. All the cases in other jurisdictions cited by the majority, *ante*, at 663 n. 28, involved allegations of punishment disproportionate to the misconduct with which the student was charged; none of the decisions even suggest that a student could recover by showing that the teacher incorrectly imposed punishment for something the student had not done. The majority appears to agree that the damages remedy is available only in cases of punishment unreasonable in light of the misconduct charged. It states: *"In those cases where severe punishment is contemplated,* the available civil and criminal sanctions for abuse . . . afford significant protection against unjustified corporal punishment." *Ante*, at 678. (Emphasis added.)

Even if the common-law remedy for excessive punishment extends to punishment that is "excessive" only in the sense that it is imposed on the basis of mistaken facts, the school authorities are still protected from personal liability by common-law immunity. (They are protected by statutory immunity for liability for enforcing disciplinary rules "[e]xcept in the case of excessive force or cruel and unusual punishment." Fla. Stat. Ann. § 232.275 (1976).) At a minimum, this immunity would protect school officials from damages liability for reasonable mistakes made in good faith. "Although there have been differing emphases and formulations of the common-law immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such

ditional common-law remedies" on which the majority relies, *ante*, at 672, thus do nothing to protect the student from the danger that concerned the Court in *Goss*—the risk of reasonable, good-faith mistake in the school disciplinary process.

Second, and more important, even if the student could sue for good-faith error in the infliction of punishment, the lawsuit occurs after the punishment has been finally imposed. The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding. There is every reason to require, as the Court did in *Goss*, a few minutes of "informal give-and-take between student and disci-

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officers should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties." *Wood* v. *Strickland*, 420 U. S. 308, 318 (1975) (adopting this rule for § 1983 suits involving school discipline) (footnote omitted); see *id.*, at 318 n. 9 (citing state cases). Florida has applied this rule to a police officer's determination of probable cause to arrest; the officer is not liable in damages for an arrest not based on probable cause if the officer reasonably believed that probable cause existed. *Miami* v. *Albro*, 120 So. 2d 23, 26 (Fla. Dist. Ct. App. 1960); cf. *Middleton* v. *Fort Walton Beach*, 113 So. 2d 431 (Fla. Dist. Ct. App. 1959) (police officer would be personally liable for intentional tort of making an arrest pursuant to warrant he knew to be void); *Wilson* v. *O'Neal*, 118 So. 2d 101 (Fla. Dist. Ct. App. 1960) (law enforcement officer not liable in damages for obtaining an arrest warrant on the basis of an incorrect identification). There is every reason to think that the Florida courts would apply a similar immunity standard in a hypothetical damages suit against a school disciplinarian.

A final limitation on the student's damages remedy under Florida law is that the student can recover only from the personal assets of the official; the school board's treasury is absolutely protected by sovereign immunity from damages for the torts of its agents. *Buck* v. *McLean*, 115 So. 2d 764 (Fla. Dist. Ct. App. 1959). A teacher's limited resources may deter the jury from awarding, or prevent the student from collecting, the full amount of damages to which he is entitled. Cf. *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1319 n. 23 (CA7 1975), modified en banc, 545 F. 2d 565 (1976), cert. pending, No. 76-6204 (state-law remedy affords due process where no sovereign or official immunity bars tort suit for negligence by prison guard).

plinarian" as a "meaningful hedge" against the erroneous infliction of irreparable injury. 419 U. S., at 583–584.[12]

The majority's conclusion that a damages remedy for excessive corporal punishment affords adequate process rests on the novel theory that the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent. The logic of this theory would permit a State that punished speeding with a one-day jail sentence to make a driver serve his sentence first without a trial and then sue to recover damages for wrongful imprisonment.[13] Similarly, the State could finally take away a prisoner's good-time credits for alleged disciplinary infractions and require him to bring a damages suit after he was eventually released. There is no authority for this theory, nor does the majority purport to find any,[14] in the procedural due process

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[12] Cf. *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 351–359 (1977). The Court there held that, in levying on a taxpayer's assets pursuant to a jeopardy assessment, revenue agents must obtain a warrant before searching the taxpayer's office but not before seizing his property in a manner that involves no invasion of privacy. *G. M. Leasing* thus reflects the principle that the case for advance procedural safeguards (such as a magistrate's determination of probable cause) is more compelling when the Government finally inflicts an injury that cannot be repaired in a subsequent judicial proceeding (invasion of privacy) than when it inflicts a temporary injury which can be undone (seizure of property). The infliction of bodily punishment, like the invasion of privacy, presents this most compelling case for advance procedural safeguards.

[13] To the extent that the majority attempts to find "a relevant analogy in the criminal law"—warrantless arrests on probable cause—to its holding here, *ante*, at 679–680 (and see *infra*, at 697–699), it has chosen the wrong analogy. If the majority forthrightly applied its present due process analysis to the area of criminal prosecutions, the police officer not only could arrest a suspect without a warrant but also could convict the suspect without a trial and sentence him to a short jail term. The accused would get his due process in a tort suit for false imprisonment.

[14] For the proposition that the need for a prior hearing is "significantly

decisions of this Court. Those cases have "consistently held that *some kind of hearing is required at some time before a person is finally deprived* of his property interests . . . [and that] a person's liberty is equally protected . . . ." *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974). (Emphasis added.)

The majority attempts to support its novel theory by drawing an analogy to warrantless arrests on probable cause, which the Court has held reasonable under the Fourth Amendment. *United States* v. *Watson*, 423 U. S. 411 (1976). This analogy fails for two reasons. First, the particular requirements of the Fourth Amendment, rooted in the "ancient common-law rule[s]" regulating police practices, *id.*, at 418, must be understood in the context of the criminal justice system for which that Amendment was explicitly tailored. Thus in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), the Court, speaking through MR. JUSTICE POWELL, rejected the argument that procedural protections required in *Goss* and other due process

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less compelling" where the State has preserved "common-law remedies," *ante*, at 679, 678, the majority cites only one case, *Bonner* v. *Coughlin*, *supra*, dismissing an allegation by a prisoner that prison guards acting under color of state law had deprived him of property without due process of law by negligently failing to close the door of his cell after a search, with the foreseeable consequence that his trial transcript was stolen. The panel held that the right to recover under state law for the negligence of state employees provided the prisoner with due process of law. The decision is distinguishable from the instant case on two grounds. First, recovery was not barred by sovereign or official immunity, and the state remedy ensured that the prisoner would be "made whole for any loss of property." 517 F. 2d, at 1319, and n. 23. Cf. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 156 (1974). The point here, of course, is that the student cannot be made whole for the infliction of wrongful punishment. Second, the State cannot hold a pre-deprivation hearing where it does not intend to inflict the deprivation; the best it can do to protect the individual from an unauthorized and inadvertent act is to provide a damages remedy. 517 F. 2d, at 1319 n. 25. Here the deprivation is intentional and a prior hearing altogether feasible.

cases should be afforded to a criminal suspect arrested without a warrant.

> "The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial. . . . Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. *The relatively simple civil procedures (e. g., prior interview with school principal before suspension) presented in the [procedural due process] cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.*" *Id.*, at 125 n. 27. (Emphasis in last sentence added.)

While a case dealing with warrantless arrests is perhaps not altogether "inapposite and irrelevant in the wholly different context" of the school disciplinary process, such a case is far weaker authority than procedural due process cases such as *Goss* v. *Lopez*, 419 U. S. 565 (1975), that deal with deprivations of liberty outside the criminal context.

Second, contrary to the majority's suggestion, *ante*, at 680 n. 48, the reason that the Court has upheld warrantless arrests on probable cause is not because the police officer's assessment of the facts "may be subjected to subsequent judicial scrutiny in a civil action against the law enforcement officer or in a suppression hearing . . . ." The reason that the Court has upheld arrests without warrants is that they are the "*first* stage of an elaborate system" of procedural protections, *Gerstein* v. *Pugh*, *supra*, at 125 n. 27, and that the State is *not* free to continue the deprivation beyond this first stage without procedures. The Constitution requires the State to provide

"a fair and reliable determination of probable cause" by a judicial officer prior to the imposition of *"any significant pretrial restraint of liberty"* other than "a brief period of detention to take the administrative steps incident to [a warrantless] arrest." *Id.*, at 114, 125. (Footnote omitted; emphasis added.) This "practical compromise" is made necessary because "requiring a magistrate's review of the factual justification prior to any arrest . . . would constitute an intolerable handicap for legitimate law enforcement," *id.*, at 113; but it is the probable-cause determination prior to any significant period of pretrial incarceration, rather than a damages action or suppression hearing, that affords the suspect due process.

There is, in short, no basis in logic or authority for the majority's suggestion that an action to recover damages for excessive corporal punishment "afford[s] substantially greater protection to the child than the informal conference mandated by *Goss*." [15] The majority purports to follow the settled principle that what process is due depends on " 'the risk of an erroneous deprivation of [the protected] interest . . . and the probable value, if any, of additional or substitute procedural safeguards' "; [16] it recognizes, as did *Goss*, the risk of error in the school disciplinary process [17] and concedes that "the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment . . . ," *ante*, at 676;

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[15] *Ante*, at 678 n. 46.

[16] *Ante*, at 675, quoting *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

[17] *Ante*, at 676, quoting *Goss*, 419 U. S., at 579–580. Elsewhere in its opinion the majority asserts that the risk of error is "typically insignificant" because "paddlings are usually inflicted in response to conduct directly observed by teachers in their presence." *Ante*, at 677–678. But it cites no finding or evidence in the record for this assertion, and there is no such restriction in the statute or regulations authorizing corporal punishment. See *ante*, at 655 n. 6, 656 n. 7. Indeed, the panel below noted specific instances in which students were punished by an assistant to the principal who was not present when the alleged offenses were committed. 498 F. 2d, at 257, 259.

but it somehow concludes that this risk is adequately reduced by a damages remedy that never has been recognized by a Florida court, that leaves unprotected the innocent student punished by mistake, and that allows the State to punish first and hear the student's version of events later. I cannot agree.

The majority emphasizes, as did the dissenters in *Goss*, that even the "rudimentary precautions" required by that decision would impose some burden on the school disciplinary process. But those costs are no greater if the student is paddled rather than suspended; the risk of error in the punishment is no smaller; and the fear of "a significant intrusion" into the disciplinary process, *ante*, at 682 (cf. *Goss*, *supra*, at 585 (POWELL, J., dissenting)), is just as exaggerated. The disciplinarian need only take a few minutes to give the student "notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U. S., at 581. In this context the Constitution requires, "if anything, less than a fair-minded school principal would impose upon himself" in order to avoid injustice.[18] *Id.*, at 583.

I would reverse the judgment below.

MR. JUSTICE STEVENS, dissenting.

MR. JUSTICE WHITE's analysis of the Eighth Amendment issue is, I believe, unanswerable. I am also persuaded that his analysis of the procedural due process issue is correct. Notwithstanding my disagreement with the Court's holding

[18] My view here expressed that the minimal procedures of *Goss* are required for any corporal punishment implicating the student's liberty interest is, of course, not meant to imply that this minimum would be constitutionally sufficient no matter how severe the punishment inflicted. The Court made this reservation explicit in *Goss* by suggesting that more elaborate procedures such as witnesses, counsel, and cross-examination might well be required for suspensions longer than the 10-day maximum involved in that case. 419 U. S., at 583–584. A similar caveat is appropriate here.

on the latter question, my respect for MR. JUSTICE POWELL's reasoning in Part IV–B of his opinion for the Court prompts these comments.

The constitutional prohibition of state deprivations of life, liberty, or property without due process of law does not, by its express language, require that a hearing be provided *before* any deprivation may occur. To be sure, the timing of the process may be a critical element in determining its adequacy—that is, in deciding what process is due in a particular context. Generally, adequate notice and a fair opportunity to be heard in advance of any deprivation of a constitutionally protected interest are essential. The Court has recognized, however, that the wording of the command that there shall be no deprivation "without" due process of law is consistent with the conclusion that a postdeprivation remedy is sometimes constitutionally sufficient.[1]

When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires. It may also be true—although I do not express an opinion on the point—that an adequate state remedy for defamation may satisfy the due process requirement when a State has impaired an individual's interest in his reputation. On that hypothesis, the Court's analysis today gives rise to the thought that *Paul* v. *Davis*, 424 U. S. 693, may have been correctly decided on an incorrect rationale. Perhaps the Court will one day

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[1] *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663; *Fuentes* v. *Shevin*, 407 U. S. 67, 82, 90–92; *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 598–600; *Phillips* v. *Commissioner*, 283 U. S. 589, 595–599; *Lawton* v. *Steele*, 152 U. S. 133, 140–142; cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 113–114.

agree with MR. JUSTICE BRENNAN's appraisal of the importance of the constitutional interest at stake in *id.*, at 720–723, 734 (dissenting opinion), and nevertheless conclude that an adequate state remedy may prevent every state-inflicted injury to a person's reputation from violating 42 U. S. C. § 1983.[2]

[2] Cf. *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1318–1320 (CA7 1975), modified en banc, 545 F. 2d 565 (1976), cert. pending, No. 76-6204; see also Judge Swygert's thoughtful opinion, *id.*, at 569–578.

VORCHHEIMER *v.* SCHOOL DISTRICT OF PHILADELPHIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-37. Argued February 22, 1977—Decided April 19, 1977

532 F. 2d 880, affirmed by an equally divided Court.

Sharon K. Wallis argued the cause for petitioner. With her on the briefs were *Ruth Bader Ginsburg* and *Melvin L. Wulf*.

Alan H. Gilbert argued the cause for respondents. With him on the brief was *Edward B. Soken*.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

**Solicitor General Bork* filed a brief for the United States as *amicus curiae*.

DARDEN *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 76-5382. Argued March 28, 1977—Decided April 19, 1977

Certiorari dismissed. Reported below: 329 So. 2d 287.

Geoffrey M. Kalmus argued the cause and filed briefs for petitioner.

Richard W. Prospect, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Robert L. Shevin*, Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissents and, adhering to his view that capital punishment is in all circumstances prohibited as cruel and unusual punishment by the Eighth and Fourteenth Amendments, would set aside the death sentence imposed in this case.

Syllabus

WOOLEY, CHIEF OF POLICE OF LEBANON, ET AL. *v.* MAYNARD ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

No. 75-1453. Argued November 29, 1976—Decided April 20, 1977

New Hampshire statutes require that noncommercial motor vehicles bear license plates embossed with the state motto, "Live Free or Die," and make it a misdemeanor to obscure the motto. Appellees, Maynard and his wife, who are followers of the Jehovah's Witnesses faith, view the motto as repugnant to their moral, religious, and political beliefs, and accordingly they covered up the motto on the license plates of their jointly owned family automobiles. Appellee Maynard was subsequently found guilty in state court of violating the misdemeanor statute on three separate charges and upon refusing to pay the fines imposed was sentenced to, and served, 15 days in jail. Appellees then brought this action in Federal District Court pursuant to 42 U. S. C. § 1983, seeking injunctive and declaratory relief against enforcement of the New Hampshire statutes; a three-judge court enjoined the State from arresting and prosecuting appellees in the future for covering the motto on their license plates. *Held:*

1. The principles of equitable restraint enunciated in *Younger* v. *Harris*, 401 U. S. 37, do not preclude the District Court from exercising jurisdiction. Pp. 709–712.

(a) When a genuine threat of state prosecutions exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights, and, aside from *Younger* principles, may seek such redress under 42 U. S. C. § 1983. Pp. 709–710.

(b) When the relief sought is wholly prospective, *i. e.*, to preclude further prosecution under a statute alleged to violate constitutional rights, failure to seek state appellate review of criminal convictions does not bar relief in federal court. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, distinguished. Pp. 710–711.

(c) The threat of repeated prosecutions in the future against both appellees, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life that require an automobile, are sufficient to justify injunctive relief, and hence the District Court was not limited to granting declaratory relief. Pp. 711–712.

2. The State may not constitutionally require an individual to par-

ticipate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. Pp. 714–717.

(a) New Hampshire's statute, by forcing an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for advocating public adherence to an ideological point of view he finds unacceptable, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control," *Board of Education* v. *Barnette*, 319 U. S. 624, 642. Pp. 714–715.

(b) The State's claimed interests in requiring display of the state motto on license plates (1) so as to facilitate the identification of passenger vehicles, and (2) so as to promote appreciation of history, individualism, and state pride, are not sufficiently compelling to justify infringement of appellees' First Amendment rights. The purpose of the first interest could be achieved by less drastic means, and the second interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for the State's ideological message. Pp. 715–717.

406 F. Supp. 1381, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined, and in which WHITE, J., joined, except insofar as it affirms the District Court's issuance of an injunction. WHITE, J., filed an opinion dissenting in part, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 717. REHNQUIST, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 719.

Robert V. Johnson II, Assistant Attorney General of New Hampshire, argued the cause for appellants. With him on the brief was *David H. Souter*, Attorney General.

Richard S. Kohn argued the cause for appellees. With him on the brief were *Jack B. Middleton*, *R. David DePuy*, *Melvin L. Wulf*, and *Joel M. Gora*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against

persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

(1)

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." [1] N. H. Rev. Stat. Ann. § 263:1 (Supp. 1975). Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] . . . the figures or letters on any number plate." N. H. Rev. Stat. Ann. § 262:27–c (Supp. 1975). The term "letters" in this section has been interpreted by the State's highest court to include the state motto. *State* v. *Hoskin*, 112 N. H. 332, 295 A. 2d 454 (1972).

Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs,[2] and therefore assert it objectionable to disseminate this message by displaying it on their automobiles.[3] Pursuant to these beliefs, the

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[1] License plates are issued without the state motto for trailers, agricultural vehicles, car dealers, antique automobiles, the Governor of New Hampshire, its Congressional Representatives, its Attorney General, Justices of the State Supreme Court, veterans, chaplains of the state legislature, sheriffs, and others.

[2] Mr. Maynard described his objection to the state motto:

"[B]y religious training and belief, I believe my 'government'—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.

". . . I also disagree with the motto on political grounds. I believe that life is more precious than freedom." Affidavit of George Maynard, App. 3.

[3] At the time this suit was commenced appellees owned two automobiles, a Toyota Corolla and a Plymouth station wagon. Both automobiles were registered in New Hampshire where the Maynards are domiciled.

Maynards began early in 1974 to cover up the motto on their license plates.[4]

On November 27, 1974, Mr. Maynard was issued a citation for violating § 262:27–c. On December 6, 1974, he appeared *pro se* in Lebanon, N. H., District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for Mr. Maynard's situation, but considered himself bound by the authority of *State* v. *Hoskin, supra,* to hold Maynard guilty. A $25 fine was imposed, but execution was suspended during "good behavior."

On December 28, 1974, Mr. Maynard was again charged with violating § 262:27–c. He appeared in court on January 31, 1975, and again chose to represent himself; he was found guilty, fined $50, and sentenced to six months in the Grafton County House of Corrections. The court suspended this jail sentence but ordered Mr. Maynard to also pay the $25 fine for the first offense. Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced him to jail for a period of 15 days. He has served the full sentence.

Prior to trial on the second offense Mr. Maynard was charged with yet a third violation of § 262:27–c on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was "continued for sentence" so that Maynard received no punishment in addition to the 15 days.

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[4] In May or June 1974 Mr. Maynard actually snipped the words "or Die" off the license plates, and then covered the resulting hole, as well as the words "Live Free," with tape. This was done, according to Mr. Maynard, because neighborhood children kept removing the tape. The Maynards have since been issued new license plates, and have disavowed any intention of physically mutiliating them.

(2)

On March 4, 1975, appellees brought the present action pursuant to 42 U. S. C. § 1983 in the United States District Court for the District of New Hampshire. They sought injunctive and declaratory relief against enforcement of N. H. Rev. Stat. Ann. §§ 262:27–c, 263:1, insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto.[5] On March 11, 1975, the single District Judge issued a temporary restraining order against further arrests and prosecutions of the Maynards. Because the appellees sought an injunction against a state statute on grounds of its unconstitutionality, a three-judge District Court was convened pursuant to 28 U. S. C. § 2281. Following a hearing on the merits,[6] the District Court entered an order enjoining the State "from arresting and prosecuting [the Maynards] at any time in the future for covering over that portion of their license plates that contains the motto 'Live Free or Die.'"[7] 406 F. Supp. 1381 (1976). We noted probable jurisdiction of the appeal. 426 U. S. 946 (1976).

(3)

Appellants argue that the District Court was precluded from exercising jurisdiction in this case by the principles of

[5] Appellees sought (a) injunctions against future criminal prosecutions for violation of the statutes and (b) an injunction requiring that in future years they be issued license plates that do not bear the state motto.

[6] Several months elapsed between the issuance of the temporary restraining order and the hearing on the merits. This delay was occasioned by the request of the State pending consideration of a bill in the New Hampshire Legislature that would have made inclusion of the state motto on passenger vehicle license plates optional with the car owner. The bill failed to gain enactment.

[7] The District Court refused to order the State of New Hampshire to issue the Maynards license plates without the state motto, although it noted that there was evidence on the record that New Hampshire could easily do so. 406 F. Supp., at 1389. See n. 1, *supra*.

equitable restraint enunciated in *Younger* v. *Harris*, 401 U. S. 37 (1971). In *Younger* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. *Id.*, at 43. However, when a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights. See *Steffel* v. *Thompson*, 415 U. S. 452 (1974); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–931 (1975). *Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U. S. C. § 1983 for an alleged deprivation of federal rights. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 609–610, n. 21 (1975). Mr. Maynard now finds himself placed "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in [another] criminal proceeding." *Steffel* v. *Thompson*, *supra*, at 462. Mrs. Maynard, as joint owner of the family automobiles, is no less likely than her husband to be subjected to state prosecution. Under these circumstances he cannot be denied consideration of a federal remedy.

Appellants, however, point out that Maynard failed to seek review of his criminal convictions and cite *Huffman* v. *Pursue, Ltd.*, *supra*, for the propositions that "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court," 420 U. S., at 608, and that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies," *id.*, at 609. *Huffman*, however, is inapposite. There the appellee was seeking to prevent, by means of federal intervention, enforcement of a state-court

judgment declaring its theater a nuisance. We held that appellee's failure to exhaust its state appeals barred federal intervention under the principles of *Younger:* "Federal post-trial intervention, in a fashion designed to annul the results of a state trial . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction." *Ibid.*

Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses.[8] He does not seek to have his record expunged, or to annul any collateral effects those convictions may have, *e. g.,* upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction.

In their complaint, the Maynards sought both declaratory and injunctive relief against the enforcement of the New Hampshire statutes. We have recognized that although "'[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical,'" *Doran* v. *Salem Inn, supra,* at 931, quoting *Samuels* v. *Mackell,* 401 U. S. 66, 73 (1971), a "district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Doran, supra,* at 931. It is correct that generally a

[8] As to the offense which was "continued for sentence," see *supra,* at 708, the District Court found that "[n]o collateral consequences will attach as a result of it unless Mr. Maynard is arrested and prosecuted for the violation of NHRSA 262:27–c at some time in the future." 406 F. Supp., at 1384.

court will not enjoin "the enforcement of a criminal statute even though unconstitutional," *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95 (1935), since "[s]uch a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*," *Doran, supra*, at 931. But this is not an absolute policy and in some circumstances injunctive relief may be appropriate. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Co., supra*, at 95.

We have such a situation here for, as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time. The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile, is sufficient to justify injunctive relief. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943). We are therefore unwilling to say that the District Court was limited to granting declaratory relief. Having determined that the District Court was not required to stay its hand as to either appellee,[9] we turn to the merits of the Maynards' claim.

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[9] If the totality of appellants' arguments were accepted, a § 1983 action could never be brought to enjoin state criminal prosecutions. According to appellants, *Younger* principles bar Mr. Maynard from seeking an injunction because he has already been subjected to prosecution. As to Mrs. Maynard, they argue, in effect, that the action is premature because no such prosecution has been instituted. Since the two spouses were similarly situated but for the fact that one has been prosecuted and one has not, we fail to see where appellants' argument would ever leave room for federal intervention under § 1983.

(4)

The District Court held that by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that "New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellee's] constitutionally protected expression." 406 F. Supp., at 1389. We find it unnecessary to pass on the "symbolic speech" issue, since we find more appropriate First Amendment grounds to affirm the judgment of the District Court.[10] We turn instead to what in our view is the essence of appellees' objection to the requirement that they display the motto "Live Free or Die" on their automobile license plates. This is succinctly summarized in the statement made by Mr. Maynard in his affidavit filed with the District Court:

> "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent." App. 5.

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

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[10] We note that appellees' claim of symbolic expression is substantially undermined by their prayer in the District Court for issuance of special license plates not bearing the state motto. See n. 5, *supra*. This is hardly consistent with the stated intent to communicate affirmative opposition to the motto. Whether or not we view appellees' present practice of covering the motto with tape as sufficiently communicative to sustain a claim of symbolic expression, display of the "expurgated" plates requested by appellees would surely not satisfy that standard. See n. 1, *supra*; *Spence* v. *Washington*, 418 U. S. 405, 410–411 (1974), *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). (MR. JUSTICE BRENNAN does not join in this note.)

A

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Id.*, at 637. This is illustrated by the recent case of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit:

> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,' *New York Times Co.* v. *Sullivan*, 376 U. S. [254,] 279 [(1964)]." *Id.*, at 257 (footnote omitted).

The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon

the individual by official authority under powers committed to any political organization under our Constitution." 319 U. S., at 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.*, at 642.

New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message—or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day.[11] The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

B

Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however.

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[11] Some States require that certain documents bear the seal of the State or some other official stamp for purposes of recordation. Such seal might contain, albeit obscurely, a symbol or motto having political or philosophical implications. The purpose of such seal, however, is not to advertise the message it bears but simply to authenticate the document by showing the authority of its origin.

We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968). The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles,[12] and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the state motto.[13] Even were we to credit the State's reasons and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the

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[12] The Chief of Police of Lebanon, N. H., testified that "enforcement of the motor vehicle laws is facilitated by the State Motto appearing on non-commercial license plates, the benefits being the ease of distinguishing New Hampshire license plates from those of similar colors of other states and the ease of discovering misuse of license plates, for instance, the use of a 'trailer' license plate on a non-commercial vehicle." Brief for Appellants 20.

[13] New Hampshire passenger vehicle license plates generally consist of two letters followed by four numbers. No other license plate category displays this combination, and no other category bears the state motto. See n. 1, *supra*. However, of the approximately 325,000 passenger plates in New Hampshire, 9,999 do not follow the regular pattern, displaying numbers only, preceded by no letters. App. 50–53.

same basic purpose." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960) (footnotes omitted).

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.[14]

We conclude that the State of New Hampshire may not require appellees to display the state motto[15] upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join in part, dissenting in part.

Steffel v. *Thompson*, 415 U. S. 452 (1974), held that when state proceedings are not pending, but only threatened, a declaratory judgment may be entered with respect to the state statute at issue without regard to the strictures of *Younger* v. *Harris*, 401 U. S. 37 (1971). But *Steffel* left

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[14] Appellants do not explain why advocacy of these values is enhanced by display on private citizens' cars but not on the cars of officials such as the Governor, Supreme Court Justices, Members of Congress, and sheriffs. See n. 1, *supra*.

[15] It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

open whether an injunction should also issue in such circumstances. 415 U. S., at 463. Then *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975), approved issuance by a federal court of a preliminary injunction against a threatened state prosecution, but only pending decision on the declaratory judgment and only then subject to "stringent" standards which should cause a district court to "weigh carefully the interests on both sides," since prohibiting the enforcement of the State's criminal law against the federal plaintiff, even pending final resolution of his case, "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." *Id.*, at 931. Although finding the issuance of a preliminary injunction not an abuse of discretion in that case, the Court also distinguished between a preliminary injunction *pendente lite* and a permanent injunction at the successful conclusion of the federal case; for "a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Ibid.*

Doran was thus true to the teachings of *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943), where the Court held that an injunction against threatened state criminal prosecutions should not issue even though the underlying state statute had already been invalidated, relying on the established rule "that courts of equity do not ordinarily restrain criminal prosecutions." *Id.*, at 163. A threatened prosecution "even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief . . . ." *Ibid.* An injunction should issue only upon a showing that the danger of irreparable injury is both "great and immediate," citing the same authorities to this effect that this Court relied on in *Younger* v. *Harris*, *supra*. In each of the cited cases—and they do not exhaust the authorities to the same effect—criminal prosecutions were not pending when this Court ruled that a federal

equity court should not enter the injunction. "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95 (1935).

The Court has plainly departed from the teaching of these cases. The whole point of *Douglas* v. *City of Jeannette*'s admonition against injunctive relief was that once a declaratory judgment had issued, further equitable relief would depend on the existence of unusual circumstances thereafter. Here the State's enforcement of its statute prior to the declaration of unconstitutionality by the federal court would appear to be no more than the performance of their duty by the State's law enforcement officers. If doing this much prior to the declaration of unconstitutionality amounts to unusual circumstances sufficient to warrant an injunction, the standard is obviously seriously eroded.

Under our cases, therefore, more is required to be shown than the Court's opinion reveals to affirm the issuance of the injunction. To that extent I dissent.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court holds that a State is barred by the Federal Constitution from requiring that the state motto be displayed on a state license plate. The path that the Court travels to reach this result demonstrates the difficulty in supporting it. The Court holds that the required display of the motto is an unconstitutional "required affirmation of belief." The District Court, however, expressly refused to consider this contention, and noted that, in an analogous case, a decision of the Supreme Court of New Hampshire had reached precisely the opposite result. See *State* v. *Hoskin*, 112 N. H. 332, 295

A. 2d 454 (1972). The District Court found for appellees on the ground that the obscuring of the motto was protected "symbolic speech." This Court, in relying upon a ground expressly avoided by the District Court, appears to disagree with the ground adopted by the District Court; indeed it points out that appellees' claim of symbolic expression has been "substantially undermined" by their very complaint in this action. *Ante,* at 713 n. 10.

I not only agree with the Court's implicit recognition that there is no protected "symbolic speech" in this case, but I think that that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. The State has not forced appellees to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that *all** noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.

In Part 4–A, the Court relies almost solely on *Board of Education* v. *Barnette,* 319 U. S. 624 (1943). The Court cites *Barnette* for the proposition that there is a constitutional right, in some cases, to "refrain from speaking." *Ante,* at 714. What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case. The Court also relies upon the "right to decline to foster [religious, political, and ideological] concepts," *ibid.,* and treats the state law in this case as if it were forcing appellees to proselytize, or to advocate an ideological point of view. But this begs the question. The issue, unconfronted by the Court, is

*See *ante,* at 707 n. 1 for *de minimis* exceptions.

whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

The Court recognizes, as it must, that this case substantially differs from *Barnette*, in which schoolchildren were forced to recite the pledge of allegiance while giving the flag salute. *Ante*, at 714–715. However, the Court states "the difference is essentially one of degree." *Ante*, at 715. But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. The Court suggests that the test is whether the individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Ibid.* But, once again, these are merely conclusory words, barren of analysis. For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers and just as clearly those individuals would be "instruments" in that communication. Certainly, however, that case would not fall within the ambit of *Barnette*. In that case, as in this case, there is no *affirmation* of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message. This was the focus of *Barnette*, and clearly distinguishes this case from that one.

In holding that the New Hampshire statute does not run afoul of our holding in *Barnette*, the New Hampshire Supreme Court in *Hoskin, supra*, at 336, 295 A. 2d, at 457, aptly articulated why there is no required affirmation of belief in this case:

> "The defendants' membership in a class of persons required to display plates bearing the State motto carries

no implication and is subject to no requirement that they endorse that motto or profess to adopt it as matter of belief."

As found by the New Hampshire Supreme Court in *Hoskin*, there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto "Live Free or Die" and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto.

The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes, see 18 U. S. C. §§ 331 and 333, proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

I would reverse the judgment of the District Court.

GRAVITT, EXECUTRIX ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-1036. Decided April 25, 1977

The District Court's order remanding a removed diversity tort action to the state courts for apparent lack of complete diversity among the parties was clearly within 28 U. S. C. § 1447 (c), which provides for remanding a removed action when the district court determines that "the case was removed improvidently and without jurisdiction," and hence, under § 1447 (d), was not reviewable by the Court of Appeals. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, distinguished.

Certiorari granted; — F. 2d —, reversed and remanded.

PER CURIAM.

This tort action was removed from the Texas state courts to the United States District Court on the grounds of diversity of citizenship but was remanded as having been "improperly removed" when it seemed that there was not complete diversity among the parties. The Court of Appeals for the Fifth Circuit, by mandamus, ordered the District Court to vacate its remand order because the latter had employed erroneous principles in concluding that it was without jurisdiction.

The Court of Appeals erred. Title 28 U. S. C. § 1447 (c) provides for remanding a removed action when the district court determines that "the case was removed improvidently and without jurisdiction"; and when a remand has been ordered on these grounds, 28 U. S. C. § 1447 (d) unmistakably commands that the order "remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." The District Court's remand order was plainly within the bounds of § 1447 (c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336

(1976), is not to the contrary, for there the District Court remanded "on grounds wholly different from those upon which § 1447 (c) permits remand." *Id.*, at 344. *Thermtron* did not question but re-emphasized the rule that § 1447 (c) remands are not reviewable.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Syllabus

UNITED STATES v. CONSUMER LIFE INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 75–1221. Argued December 6, 1976—Decided April 26, 1977*

Under § 801 (a) of the Internal Revenue Code of 1954, an insurance company is considered a life insurance company for federal tax purposes if its life insurance reserves constitute more than 50% of its "total reserves," as that term is defined in § 801 (c). Qualifying companies are accorded preferential tax treatment. The question here is how unearned premium reserves for accident and health (nonlife) insurance policies should be allocated between a primary insurer and a reinsurer for purposes of applying the 50% test. The unearned premium reserve is the basic insurance reserve in the casualty insurance business and an important component of "total reserves" under § 801 (c)(2). The taxpayers contend that by virtue of certain reinsurance agreements ("treaties") they have maintained nonlife reserves below the 50% level. These treaties were of two basic types: (1) Treaty I, whereby the taxpayer served as reinsurer, and the "other party" was the primary insurer or ceding company; and (2) Treaty II, whereby the taxpayer served as the primary insurer and ceded a portion of the business to the "other party," the reinsurer. Both types of treaties provided that the other party would hold the premium dollars derived from accident and health business until such time as the premiums were "earned," *i. e.*, attributable to the insurance protection provided during the portion of the policy term already elapsed. The other party also set up on its books the corresponding unearned premium reserve, relieving the taxpayer of that requirement, even though the taxpayer assumed all substantial insurance risks. In each case, the taxpayer and the other party reported their affairs annually in this way to both the Internal Revenue Service and the appropriate state insurance departments. Despite the state authorities' acceptance of these annual statements, the

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*Together with No. 75–1260, *First Railroad & Banking Company of Georgia* v. *United States*, on certiorari to the United States Court of Appeals for the Fifth Circuit, and No. 75–1285, *United States* v. *Penn Security Life Insurance Co.*, also on certiorari to the United States Court of Claims.

Government argues that the unearned premium reserves must be allocated or attributed for tax purposes from the other parties to the taxpayers, with the result that the taxpayers fail the 50% test and thus are disqualified from preferential tax treatment, primarily because, in the Government's view, § 801 embodies a rule that "insurance reserves follow the insurance risk." *Held:*

1. The reinsurance treaties served valid business purposes and, contrary to the Government's argument, were not sham transactions without economic substance. Pp. 736–739.

2. Since the taxpayers neither held the unearned premium dollars nor set up the corresponding unearned premium reserves, and since that treatment was in accord with customary practice as policed by the state regulatory authorities, § 801 (c)(2) does not permit attribution to the taxpayers of the reserves held by the other parties to the reinsurance treaties. Pp. 739–750.

(a) The language of § 801 (c)(2) does not suggest that Congress intended a "reserves follow the risk" rule to govern determinations under § 801. Pp. 740–741.

(b) Nor does the legislative history of § 801 furnish support for the Government's interpretation. Pp. 742–745.

(c) Section 820 of the Code, prescribing the tax treatment of modified coinsurance contracts, affords an unmistakable indication that Congress did not intend § 801 to embody a "reserves follow the risk" rule. Pp. 745–750.

3. Nor is attribution of unearned premium reserves to the taxpayers required under § 801 (c)(3), counting in total reserves "all other insurance reserves required by law." There is no indication that state statutory law in these cases required the taxpayers to set up and maintain the contested unearned premium reserves, especially since the insurance departments of the affected States consistently accepted annual reports showing reserves held as the taxpayers claim they should be. Pp. 750–752.

No. 75–1221, 207 Ct. Cl. 638, 524 F. 2d 1167, and No. 75–1285, 207 Ct. Cl. 594, 524 F. 2d 1155, affirmed; No. 75–1260, 514 F. 2d 675, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 753.

Stuart A. Smith argued the cause for the United States in all cases. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Crampton, Acting Assistant Attorney General Baum, Ernest J. Brown,* and *Herbert Grossman. James R. Harper* argued the cause for petitioner in No. 75–1260. With him on the brief was *Irving R. M. Panzer.*

E. Michael Masinter argued the cause for respondent in No. 75–1221. With him on the brief was *James H. Landon. John B. Jones, Jr.,* argued the cause for respondent in No. 75–1285. With him on the brief were *John T. Sapienza, Andrew W. Singer, Owen T. Armstrong,* and *Robert A. Kagan.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question for decision is how unearned premium reserves for accident and health (A&H) insurance policies should be allocated between a primary insurer and a reinsurer for federal tax purposes. We granted certiorari in these three cases to resolve a conflict between the Circuits and the Court of Claims. 425 U. S. 990 (1976).

I

An insurance company is considered a life insurance company under the Internal Revenue Code if its life insurance reserves constitute more than 50% of its total reserves, IRC of 1954, § 801 (a), 26 U. S. C. § 801 (a),[1] and qualifying com-

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[1] Section 801 (a) provides:

"(a) Life insurance company defined.

"For purposes of this subtitle, the term "life insurance company" means an insurance company which is engaged in the business of issuing life insurance and annuity contracts (either separately or combined with health and accident insurance), or noncancellable contracts of health and accident insurance, if—

"(1) its life insurance reserves (as defined in subsection (b)), plus

"(2) unearned premiums, and unpaid losses (whether or not ascer-

panies are accorded preferential tax treatment.[2] A company close to the 50% line will ordinarily achieve substantial tax savings if it can increase its life insurance reserves or decrease nonlife reserves so as to come within the statutory definition.

The taxpayers here are insurance companies that assumed both life insurance risks and A&H—nonlife—risks. The dispute in these cases is over the computation for tax purposes of nonlife reserves. The taxpayers contend that by virtue of certain reinsurance agreements—or treaties, to use the term commonly accepted in the insurance industry—they have maintained nonlife reserves below the 50% level. The Government argues that the reinsurance agreements do not have that effect, that the taxpayers fail to meet the 50% test, and that accordingly they do not qualify for preferential treatment.[3]

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tained), on noncancellable life, health, or accident policies not included in life insurance reserves,

"comprise more than 50 percent of its total reserves (as defined in subsection (c))."

As may be seen, the statement in the text is somewhat oversimplified. Reserves for noncancellable life, health, or accident policies are added to life insurance reserves for purposes of computing the ratio. See generally *Alinco Life Ins. Co.* v. *United States*, 178 Ct. Cl. 813, 831–847, 373 F. 2d 336, 345–355 (1967). Since none of these cases, as they reach us, involves any issue concerning noncancellable policies, we may ignore this factor.

Statutory citations, unless otherwise indicated, are to the Internal Revenue Code of 1954.

[2] The major benefit is that only 50% of underwriting income is taxed in the year of receipt, the balance being taxed only when made available to stockholders. The scheme for taxing life insurance companies is described in *United States* v. *Atlas Life Ins. Co.*, 381 U. S. 233 (1965), and *Jefferson Standard Life Ins. Co.* v. *United States*, 408 F. 2d 842, 844–846 (CA4), cert. denied, 396 U. S. 828 (1969).

Stock companies that fail to qualify as life insurance companies are taxed under the less favorable provisions of § 831. Most mutual insurance companies other than life are taxed under § 821, a section not implicated here since taxpayers are all stock companies.

[3] In two of the cases, the Court of Claims held for the taxpayer. *Con-*

Specifically the dispute is over the unearned premium reserve, the basic insurance reserve in the casualty insurance business and an important component of "total reserves," as that term is defined in § 801 (c).[4] A&H policies of the type involved here generally are written for a two- or three-year term. Since policyholders typically pay the full premium in advance, the premium is wholly "unearned" when the primary insurer initially receives it. See Rev. Rul. 61–167, 1961–2 Cum. Bull. 130, 132. The insurer's corresponding liability can be discharged in one of several ways: granting future protection by promising to pay future claims; reinsuring the risk with a solvent reinsurer; or returning a pro rata portion of the premium in the event of cancellation. Each method of discharging the liability may cost money. The insurer thus establishes on the liability side of its accounts a reserve, as a device to help assure that the company will have the assets necessary to meet its future responsibilities. See O. Dickerson, Health Insurance 604–605 (3d ed. 1968) (hereafter Dickerson). Standard accounting practice in the casualty field, made mandatory by all state regulatory authorities, calls

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sumer Life Ins. Co. v. *United States*, 207 Ct. Cl. 638, 524 F. 2d 1167 (1975); *Penn Security Life Ins. Co.* v. *United States*, 207 Ct. Cl. 594, 524 F. 2d 1155 (1975). In the third case, the Court of Appeals for the Fifth Circuit ruled in favor of the Government. *First Railroad & Banking Co. of Georgia* v. *United States*, 514 F. 2d 675 (1975). It relied on an earlier holding to the same effect in *Economy Finance Corp.* v. *United States*, 501 F. 2d 466 (CA7 1974), cert. denied, 420 U. S. 947, rehearing denied, 421 U. S. 922 (1975), motion for leave to file second petition for rehearing pending, No. 74–701.

[4] Section 801 (c) provides in relevant part:

"(c) Total reserves defined.

"For purposes of subsection (a), the term 'total reserves' means—

"(1) life insurance reserves,

"(2) unearned premiums, and unpaid losses (whether or not ascertained), not included in life insurance reserves, and

"(3) all other insurance reserves required by law."

"Life insurance reserves" is defined in § 801 (b).

for reserves equal to the gross unearned portion of the premium.[5] A simplified example may be useful: A policyholder takes out a three-year A&H policy for a premium, paid in advance, of $360. At first the total $360 is unearned, and the insurer's books record an unearned premium reserve in the full amount of $360. At the end of the first month, one thirty-sixth of the term has elapsed, and $10 of the premium has become "earned."[6] The unearned premium reserve may be reduced to $350. Another $10 reduction is permitted at the end of the second month, and so on.

II

The reinsurance treaties at issue here assumed two basic forms.[7] Under the first form, Treaty I, the taxpayer served as reinsurer, and the "other party" was the primary insurer or "ceding company," in that it ceded part or all of its risk to the taxpayer. Under the second form, Treaty II, the taxpayer served as the primary insurer and ceded a portion of the business to the "other party," that party being the reinsurer. Both types of treaties provided that the other party

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[5] See Treas. Reg. § 1.801–3 (e) (1960) (defining unearned premiums), explained in Rev. Rul. 69–270, 1969–1 Cum. Bull. 185; *Utah Home Fire Ins. Co.* v. *Commissioner*, 64 F. 2d 763 (CA10), cert. denied, 290 U. S. 679 (1933); nn. 16 and 20, *infra*. See generally *Massachusetts Protective Assn.* v. *United States*, 114 F. 2d 304 (CA1 1940); *Commissioner* v. *Monarch Life Ins. Co.*, 114 F. 2d 314 (CA1 1940).

[6] This figure is derived from a straight-line or pro rata method of computing earned premiums. Some companies use a sum-of-the-digits method known as the Rule of 78, described in detail by the Court of Claims in the *Penn Security* case, No. 75–1285, Pet. for Cert. 34a–36a (Findings of Fact Nos. 10, 11). The difference in computation methods is not material for present purposes.

[7] Each was an indemnity reinsurance treaty, obligating the reinsurer to reimburse the ceding company for its share of losses. Such treaties constitute contracts between the companies only; the policyholders are not involved and usually remain unaware that part or all of the risk has been reinsured.

would hold the premium dollars derived from A&H business until such time as the premiums were earned—that is, attributable to the insurance protection provided during the portion of the policy term that already had elapsed. The other party also set up on its books the corresponding unearned premium reserve, relieving the taxpayer of that requirement. In each case, the taxpayer and the other party reported their affairs annually in this fashion to both the Internal Revenue Service and the appropriate state insurance departments. These annual statements were accepted by the state authorities without criticism. Despite this acceptance, the Government argues here that the unearned premium reserves must be allocated or attributed for tax purposes from the other parties, as identified above, to the taxpayers,[8] thereby disqualifying each of the taxpayers from preferential treatment.

A

No. 75–1221, *United States* v. *Consumer Life Ins. Co.* In 1957 Southern Discount Corp. was operating a successful consumer finance business. Its borrowers, as a means of assuring payment of their obligations in the event of death or disability, typically purchased term life insurance and term A&H insurance at the time they obtained their loans. This insurance—commonly known as credit life and credit A&H—is usually coextensive in term and coverage with the term and amount of the loan. The premiums are generally paid in full

[8] The Government makes this attribution not under the familiar allocation rules of §§ 269 and 482, but rather based primarily on its interpretation of § 801 (c). Indeed, the former sections could not apply except in No. 75–1260, the *First Railroad* case, for only that case involves a reinsurance agreement between corporations controlled by the same interests. The Government invokes neither section here, though it has on occasion attempted to use both in its efforts to impose higher taxes on companies engaged in the credit life insurance business. See *Commissioner* v. *First Security Bank of Utah*, 405 U. S. 394 (1972) (§ 482); *Alinco Life Ins. Co.* v. *United States*, 178 Ct. Cl., at 822–830, 373 F. 2d, at 340–345 (§ 269).

at the commencement of coverage, the loan term ordinarily running for two or three years. Prohibited from operating in Georgia as an insurer itself, Southern served as a sales agent for American Bankers Life Insurance Co., receiving in return a sizable commission for its services.

With a view to participating as an underwriter and not simply as agent in this profitable credit insurance business, Southern formed Consumer Life Insurance Co., the taxpayer here, as a wholly owned subsidiary incorporated in Arizona, the State with the lowest capital requirements for insurance companies. Although Consumer Life's low capital precluded it from serving as a primary insurer under Georgia law, it was nonetheless permitted to reinsure the business of companies admitted in Georgia.

Consumer Life therefore negotiated the first of two reinsurance treaties with American Bankers. Under Treaty I, Consumer Life served as reinsurer and American Bankers as the primary insurer or ceding company. Consumer Life assumed 100% of the risks on credit life and credit A&H business originating with Southern, agreeing to reimburse American Bankers for all losses as they were incurred. In return Consumer Life was paid a premium equivalent to 87½% of the premiums received by American Bankers.[9] But the mode of payment differed as between life and A&H policies. With respect to life insurance policies, American Bankers each month remitted to the reinsurer—Consumer Life—the stated percentage of all life insurance premiums *collected* during the prior month. With respect to A&H coverage, however, American Bankers each month remitted the stated percentage of the A&H premiums *earned* during the prior month, the remainder to be paid on a pro rata basis over the balance of the coverage period.

Again an example might prove helpful. Assume that a

[9] Consumer Life's premium was later increased to 90½%.

policyholder buys from American Bankers on January 1 a three-year credit life policy and a three-year credit A&H policy, paying on that date a $360 premium for each policy. On February 1, under Treaty I, American Bankers would be obligated to pay Consumer Life 87½% of $360 for reinsurance of life risks. This represents the total life reinsurance premium; there would be no further payments for life reinsurance. But for A&H reinsurance, American Bankers would remit on February 1 only the stated percentage of $10, since only $10 would have been earned during the prior month. It would remit the same amount on March 1 for A&H coverage provided during February, and so on for a total of 36 months.

Treaty I permitted either party to terminate the agreement upon 30 days' notice. But termination was to be prospective; reinsurance coverage would continue on the same terms until the policy expiration date for all policies already executed. This is known as a "runoff provision."

Because it held the unearned A&H premium dollars, and also under an express provision in Treaty I, American Bankers set up an unearned premium reserve equivalent to the full value of the premiums. Meantime Consumer Life, holding no unearned premium dollars, established on its books no unearned premium reserve for A&H business.[10] Annual statements filed with the state regulatory authorities in Arizona and Georgia reflected this treatment of reserves, and the statements were accepted without challenge or disapproval.

By 1962 Consumer Life had accumulated sufficient surplus to qualify under Georgia law as a primary insurer. Treaty I was terminated, and Southern began placing its credit insurance business directly with Consumer Life. The parties then negotiated Treaty II, under which American Bankers served as reinsurer of the A&H policies issued by Consumer

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[10] Consumer Life did set up the full tabular reserve for the life insurance policies. See n. 20, *infra*.

Life.[11] Ultimately Consumer Life retained the lion's share of the risk, but Treaty II was set up in such a way that American Bankers held the premium dollars until they were earned. This required rather complicated contractual provisions, since Consumer Life as primary insurer did receive the A&H premium dollars initially.

Roughly described, Treaty II provided as follows: Consumer Life paid over the A&H premiums when they were received. American Bankers immediately returned 50% of this sum as a ceding commission meant to cover Consumer Life's initial expenses. Then, at the end of each quarter, American Bankers paid to Consumer Life "experience refunds" based on claims experience. If there were no claims, American Bankers would refund 47% of the total *earned* premiums. If there were claims (and naturally there always were), Consumer Life received 47% less the sums paid to meet claims. It is apparent that American Bankers would never retain more than 3% of the total earned premiums for the quarter. Only if claims exceeded 47% would this 3% be encroached, but even in that event Treaty II permitted American Bankers to recoup its losses by reducing the experience refund in later quarters. Actual claims experience never approached the 47% level.

Again, since American Bankers held the unearned premiums, it set up the unearned premium reserve on its books. Consumer Life, which initially had set up such a reserve at the time it received the premiums, took credit against them for the reserve held by American Bankers. Annual statements filed by both companies consistently reflected this treatment of reserves under Treaty II, and at no time did state authorities take exception.[12]

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[11] Under Treaty II the life business was not reinsured; Consumer Life, by itself, assumed the full liability.

[12] In addition to reviewing reports filed on prescribed forms, state regulatory authorities conduct regular triennial examinations of insurance

The taxable years 1958 through 1960, and 1962 through 1964, are at issue here. For each of those years Consumer Life computed its § 801 ratio based on the reserves shown on its books and accepted by the state authorities. According to those figures, Consumer Life qualified for tax purposes as a life insurance company. The Commissioner of Internal Revenue determined, however, that the A&H reserves held by American Bankers should be attributed to Consumer Life, thereby disqualifying the latter from favorable treatment. Consumer Life paid the deficiency assessed by the Commissioner and brought suit for a refund. The Court of Claims, disagreeing with its trial judge, held for the taxpayer.

B

No. 75–1260, *First Railroad & Banking Company of Georgia* v. *United States*. The relevant taxable entity in this case is First of Georgia Life Insurance Co., a subsidiary of the petitioner First Railroad & Banking Co. of Georgia. Georgia Life was party to a Treaty II type agreement,[13] reinsuring its A&H policies with an insurance company, another subsidiary of First Railroad.[14] On the basis of the reserves carried on its books and approved by state authorities, Georgia Life quali-

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companies, commonly pooling their efforts through the National Association of Insurance Commissioners (NAIC). Such examinations ordinarily include a thorough review of all reinsurance agreements. See generally NAIC, Examiners Handbook A30–A35 (3d ed. rev. 1970, 2d printing 1974). While these treaties were in effect, each company was examined twice, Consumer Life in 1959 and 1963, and American Bankers in 1960 and 1963. The Court of Claims found that the reinsurance treaties were examined in detail, and that the provisions for maintenance of reserves were approved in the course of all four examinations. 207 Ct. Cl., at 647, 524 F. 2d, at 1172.

[13] Some of the details differ from Treaty II in *Consumer Life*, but the differences are not important for present purposes.

[14] The Government does not seek to base attribution of reserves on this relationship. See n. 8, *supra*.

fied as a life insurance company for the years at issue here, 1961–1964. Consequently First Railroad excluded Georgia Life's income from its consolidated return, pursuant to § 1504 (b)(2) of the Code. The Commissioner determined that Georgia Life did not qualify for life insurance company status or exclusion from the consolidated return, and so assessed a deficiency. First Railroad paid and sued for a refund. It prevailed in the District Court, but the Court of Appeals for the Fifth Circuit reversed, relying heavily on *Economy Finance Corp.* v. *United States*, 501 F. 2d 466 (CA7 1974), cert. denied, 420 U. S. 947, rehearing denied, 421 U. S. 922 (1975), motion for leave to file second petition for rehearing pending, No. 74–701.

C

No. 75–1285, *United States* v. *Penn Security Life Ins. Co.* Penn Security Life Insurance Co., a Missouri corporation, is, like Consumer Life, a subsidiary of a finance company. Under three separate Treaty I type agreements, it reinsured the life and A&H policies of three unrelated insurers during the years in question, 1963–1965. The other companies reported the unearned premium reserves, and the Missouri authorities approved this treatment. Because one of the three treaties did not contain a runoff provision like that present in *Consumer Life*, the Government conceded that the reserves held by that particular ceding company should not be attributed to the taxpayer. But the other two treaties were similar in all relevant respects to Treaty I in *Consumer Life*. After paying the deficiencies assessed by the Commissioner, Penn Security sued for a refund in the Court of Claims. Both the trial judge and the full Court of Claims ruled for the taxpayer.

III

The Government commences its argument by suggesting that these reinsurance agreements were sham transactions

without economic substance and therefore should not be recognized for tax purposes. See, *e. g.*, *Gregory* v. *Helvering*, 293 U. S. 465, 470 (1935); *Knetsch* v. *United States*, 364 U. S. 361 (1960). We do not think this is an accurate characterization.

Both taxpayers who were parties to Treaty I agreements entered into them only after arm's-length negotiation with unrelated companies. The ceding companies gave up a large portion of premiums, but in return they had recourse against the taxpayers for 100% of claims. The ceding companies were not just doing the taxpayers a favor by holding premiums until earned. This delayed payment permitted the ceding companies to invest the dollars, and under the treaties they kept all resulting investment income. Nor were they mere "paymasters," as the Government contends, for indemnity reinsurance of this type does not relieve the ceding company of its responsibility to policyholders. Had the taxpayers become insolvent, the insurer still would have been obligated to meet claims.[15]

Treaty II also served most of the basic business purposes commonly claimed for reinsurance treaties. See W. Hammond, Insurance Accounting Fire & Casualty 86 (2d ed. 1965); Dickerson 563–564. It reduced the heavy burden on the taxpayer's surplus caused by the practice of computing casualty reserves on the basis of gross unearned premiums even though the insurer may have paid out substantial sums in commissions and expenses at the commencement of coverage. By reducing this drain on surplus, the

[15] Treaty I type reinsurance is therefore different from the relation of agent and insurer found in *Superior Life Ins. Co.* v. *United States*, 462 F. 2d 945 (CA4 1972) (credit A&H premiums were held by the finance company until earned and only then paid to the insurance company; the court held that under state law the finance company was a mere agent and the insurance company would be treated as holding the unearned premium reserve).

taxpayer was able to expand its business, resulting in a broader statistical base that permitted more accurate loss predictions.[16] Through Treaty II each taxpayer associated itself with a reinsurance company more experienced in the field. Moreover, under Treaty II the taxpayers were shielded against a period of catastrophic losses. Even though the reinsurer would eventually recapture any such deep losses, it would be of substantial benefit to the ceding company to spread those payments out over a period of months or years. Both courts

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[16] Surplus drain may be illustrated by the following example: A company issues a one-year A&H policy for a premium of $120, paying its agent a $60 commission at the time of issuance. The state insurance department will require the company to set up a reserve on the liability side of its balance sheet equivalent to the gross unearned premium—$120 at the beginning of coverage. But after paying the commission the company shows a cash asset of only $60. The $60 difference results in a $60 decrease in surplus.

As each month elapses, $10—one-twelfth of the annual premium—becomes "earned" and is therefore released from the reserve. A company whose business is level, writing new policies only as an equivalent number of old policies expire, will therefore experience no surplus drain, assuming that claims experience is within the expected range; the pro rata release from reserves as premiums become earned will match the burden imposed by new policies. But companies whose business is expanding, and especially new companies, will have a continuing surplus-drain problem. See generally Dickerson 606; *Utah Home Fire Ins. Co.* v. *Commissioner*, 64 F. 2d, at 764; n. 20, *infra*.

Reinsurance can provide amelioration. Assume the company in the example above reinsures half its business under a treaty with simpler provisions than Treaty I or Treaty II. This treaty calls for the reinsurer to establish a reserve equal to 50% of the gross unearned premium, in return for immediate payment of 50% of the primary insurer's net premium income. The primary company then takes credit against its reserve for the business ceded; its reserve is reduced from $120 to $60. At the same time it remits half its net income, $30, retaining a cash asset of $30. Each policy written on this basis therefore drains surplus only by $30, the difference between the $60 reserve and the $30 asset. Under the treaty the company can issue twice as many policies as before for the same total depletion in surplus.

below that passed on Treaty II agreements found expressly that the treaties served valid and substantial nontax purposes.[17] Tax considerations well may have had a good deal to do with the specific terms of the treaties, but even a "major motive" to reduce taxes will not vitiate an otherwise substantial transaction. *United States* v. *Cumberland Pub. Serv. Co.*, 338 U. S. 451, 455 (1950).[18]

IV

Whether or not these were sham transactions, however, the Government would attribute the contested unearned premium reserves to the taxpayers because it finds in § 801 (c)(2) a rule that "insurance reserves follow the insurance risk." Brief for United States 34. This assertion, which forms the heart of the Government's case, is based on the following reasoning. Section 801 provides a convenient test for determining whether a company qualifies for favorable tax treatment as a life insurance company, a test determined wholly by the ratio of life reserves to total reserves. Reserves, under accepted accounting and actuarial standards, represent liabilities. Although often carelessly referred to as "reserve funds," or as being available to meet policyholder claims, reserves are not assets; they are entered on the liability side of the balance sheet. Under standard practice they are mathematically equivalent to the gross unearned premium dollars already

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[17] *Consumer Life*, No. 75–1221, Pet. for Cert. 97a–98a, 100a, 105a (Findings of Fact Nos. 18, 19, 25, 37); *First Railroad*, No. 75–1260, Pet. for Cert. 14a–15a (District Court finding of fact accepted by the Court of Appeals, 514 F. 2d, at 677).

[18] The Government also relies on an asserted analogy to *Commissioner* v. *Hansen*, 360 U. S. 446 (1959). That case, dealing with a question of ordinary accrual accounting, is inapposite. Life insurance accounting is a world unto itself. See *Brown* v. *Helvering*, 291 U. S. 193, 201 (1934); *Great Commonwealth Life Ins. Co.* v. *United States*, 491 F. 2d 109 (CA5 1974). Mechanical application of ordinary accounting principles will not necessarily yield a sound result.

paid in, but conceptually the reserve—a liability—is distinct from the cash asset. This much of the argument is indisputably sound.

The Government continues: Since a reserve is a liability, it is simply an advance indicator of the final liability for the payment of claims. The company that finally will be responsible for paying claims—the one that bears the ultimate risk—should therefore be the one considered as having the reserves. In each of these cases, the Government argues, it was the taxpayer that assumed the ultimate risk. The other companies were merely paymasters holding on to the premium dollars until earned in return for a negligible percentage of the gross premiums.

A

We may assume for present purposes that the taxpayers did take on all substantial risks under the treaties.[19] And in the broadest sense reserves are, of course, set up because of future risks. Cf. *Helvering* v. *Le Gierse*, 312 U. S. 531, 539 (1941). The question before us, however, is not whether the Government's position is sustainable as a matter of abstract logic.[20] Rather it is whether Congress intended a "reserves follow the risk" rule to govern determinations under § 801.

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[19] It is not difficult to conceive of changes in the treaties, however, that would make it much harder to determine whether the other party bore a substantial risk. And if any risk that may be called substantial is sufficient to permit the parties to escape the attribution for which the Government argues, then surely a Government victory here would be short-lived. Cf. *Commissioner* v. *Brown*, 380 U. S. 563, 580 (1965) (Harlan, J., concurring).

[20] It is clear, in any event, that the traditional actuarial and accounting treatment of A&H reserves is not built entirely on a logic of risk. The premium charged the policyholder consists of two parts, an expense portion, or "loading," to cover commissions, administrative expenses, and profit, and a claims portion. Only the latter, the net premium or "morbidity" element, represents the company's estimate of what it must now

There is no suggestion in the plain language of the section that this is the case. See nn. 1 and 4, *supra*. If anything, the language is a substantial obstacle to accepting the Government's position. The word "risk" does not occur. Moreover, in § 801 (c)(2) Congress used the phrase "unearned premiums" rather than "unearned premium reserve." The Government argues that, taken in context, "unearned premiums" must be regarded as referring to reserves—to the liability account for unearned premium reserves and not the asset represented by the premium dollars. We agree that the reference is to reserves, but still the use of the truncated phrase suggests that Congress intended a mechanical application of the concept. In other words, this phrase suggests that in Congress' view unearned premium reserves always would be found in the same place as the unearned premiums themselves. If so, reserves would follow mechanically the premium dollars, as taxpayers contend, and would not necessarily follow the risk.

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take in and invest to meet its responsibilities as claims arise; that is, only the latter represents the company's risk. The expense portion is relatively fixed. Nearly all of it is paid out, for commissions and administrative expenses connected with issuing the policy, at the time the premiums are received. Since these expenses already have been paid, the only future liabilities for which a reserve strictly is needed are claims. Nevertheless, state insurance departments uniformly require that A&H reserves be set up equivalent to the *gross* unearned premium. A&H reserves thus stand on a different footing from life insurance reserves, which are typically computed on the basis of mortality tables and assumed rates of interest. See § 801 (b). Life reserves contain no loading element.

Although gross unearned premium reserves may not strictly comport with a logic of risk, from the viewpoint of insurance regulators this approach yields advantages in simplicity of computation. Establishing the larger reserve also tends to assure conservative operation and the availability of means to pay refunds in the event of cancellation. See generally Mayerson, Ensuring the Solvency of Property and Liability Insurance Companies, in Insurance, Government and Social Policy 146, 171–172 (S. Kimball & H. Denenberg eds. 1969); Dickerson 604–606; *Utah Home Fire Ins. Co.* v. *Commissioner*, 64 F. 2d, at 764.

B

The rather sparse legislative history furnishes no better support for the Government's position. Under the early Revenue Acts, all insurance companies were taxed on the same basis as other corporations. Both investment income and premium or underwriting income were included in gross income, although there was a special deduction for additions to reserves. See, *e. g.*, Revenue Act of 1918, § 234 (a)(10), 40 Stat. 1079.

By 1921 Congress became persuaded that this treatment did not accurately reflect the nature of the life insurance enterprise, since life insurance is often a form of savings for policyholders, similar in some respects to a bank deposit. See Hearings on H. R. 8245 before the Senate Committee on Finance, 67th Cong., 1st Sess., 83 (1921) (testimony of Dr. T. S. Adams, Tax Adviser to Treasury Department). Under this view, premium receipts "were not true income [to the life insurance company] but were analogous to permanent capital investment." *Helvering* v. *Oregon Mutual Life Ins. Co.*, 311 U. S. 267, 269 (1940). The 1921 Act therefore provided, for the first time, that life insurance companies would be taxed on investment income alone and not on premium receipts. Revenue Act of 1921, §§ 242–245, 42 Stat. 261. The same rationale did not apply to other forms of insurance, and Congress continued to tax insurance companies other than life on both underwriting and investment income. §§ 246–247.

The 1921 Act was thus built on the assumption that important differences between life and nonlife insurance called for markedly different tax treatment. Strict adherence to this policy rationale would dictate that any company insuring both types of risks be required to segregate its life and nonlife business so that appropriate tax rules could be applied to each. Congress considered this possibility but chose instead

a more convenient rule of thumb,[21] the 50% reserve ratio test.[22] The Treasury official primarily responsible for the 1921 Act explained:

> "Some companies mix with their life business accident and health insurance. It is not practicable for all companies to disassociate those businesses so that we have assumed that if this accident and health business was more than 50 per cent of their business, as measured by their reserves, it could not be treated as a life insurance company. On the other hand, if their accident and health insurance were incidental and represented less than 50 per cent of their business we treated them as a life insurance company." 1921 Hearings, *supra*, at 85 (testimony of Dr. T. S. Adams).

This passage constitutes the only significant reference to the test in the 1921 deliberations.

In succeeding years controversy developed over the preferential treatment enjoyed by life insurance companies. There were claims that they were not carrying their fair share of the tax burden. There were charges that stock companies were favored over mutuals, or vice versa. There was

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[21] Since Congress thus has not adhered completely to the policy underlying its choice to tax life insurance companies differently from other insurance companies, we believe the court in *Economy Finance Corp.* v. *United States*, 501 F. 2d 466 (CA7 1974), relied too heavily on its reading of that policy in finding that unearned premium reserves should be attributed from the ceding company to the reinsurer in a Treaty I type agreement. See *Penn Security*, 207 Ct. Cl., at 608, 524 F. 2d, at 1162.

[22] Section 242 of the 1921 Act, 42 Stat. 261, provided:

"That when used in this title the term 'life insurance company' means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds."

a nagging question over just how to compute a proper deduction for additions to reserves. Congress tried a host of different formulas to ameliorate these problems. See H. R. Rep. No. 34, 86th Cong., 1st Sess., 2–7 (1959); S. Rep. No. 291, 86th Cong., 1st Sess., 3–11 (1959); *Alinco Life Ins. Co.* v. *United States*, 178 Ct. Cl. 813, 831–837, 373 F. 2d 336, 345–349 (1967). But throughout these years the 50% test was not significantly changed.[23]

In 1959 Congress passed legislation that finally established a permanent tax structure for life insurance companies. Life Insurance Company Income Tax Act of 1959, 73 Stat. 112. For the first time since 1921, not only investment income but also a portion of underwriting income was made subject to taxation.[24] But even as Congress was rewriting the substantive provisions for taxing life insurance companies, it did not, despite occasional calls for change,[25] make any relevant alterations in § 801. Moreover, the few references to that provision

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[23] In 1942 Congress did add a definition of "total reserves," specifying the same three elements that appear in the definition today. Revenue Act of 1942, § 163, 56 Stat. 867, amending § 201 (b) of the Internal Revenue Code of 1939. The 1942 committee reports take note of the addition, but do not elaborate. There is no glimmer of a "reserves follow the risk" rule. H. R. Rep. No. 2333, 77th Cong., 2d Sess., 109 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess., 145 (1942).

[24] See n. 2, *supra*.

[25] During the hearings a number of witnesses and legislators expressed a concern that so-called specialty companies, particularly credit life insurance companies, were reaping excessive benefits from preferential life insurance company taxation. See, *e. g.*, Hearings before the Subcommittee on Internal Revenue Taxation of the House Committee on Ways and Means, 85th Cong., 2d Sess., 78, 242–244, 330, 422–434 (1958); Hearings on H. R. 4245 before the Senate Committee on Finance, 86th Cong., 1st Sess., 84–85 (1959). Some proposed to deny them these benefits by altering the definition in § 801. See House Hearings, *supra*, at 78, 330; Senate Hearings, *supra*, at 85. No one addressed the question of reserve allocation under reinsurance contracts like those involved here, but Congress clearly was made aware that § 801 often led to what some considered undesirable results

in the committee reports shed little light on the issue presented here.[26] They contain no explicit or implicit support for a rule that reserves follow the risk.

C

More important than anything that appears in hearings, reports, or debates is a provision added in 1959, § 820, concerning modified coinsurance contracts between life insurance companies.[27] This section, although designed to deal with a

when applied to credit life insurance companies. See also H. R. Rep. No. 1098, 84th Cong., 1st Sess., 3–7 (1955); S. Rep. No. 1571, 84th Cong., 2d Sess., 3–8 (1956).

[26] H. R. Rep. No. 34, 86th Cong., 1st Sess., 22–23 (1959); S. Rep. No. 291, 86th Cong., 1st Sess., 41–44 (1959).

[27] Section 820 provides in relevant part:

"§ 820. Optional treatment of policies reinsured under modified coinsurance contracts.

"(a) In general.

"(1) Treatment as reinsured under conventional coinsurance contract.

"Under regulations prescribed by the Secretary or his delegate, an insurance or annuity policy reinsured under a modified coinsurance contract (as defined in subsection (b)) shall be treated, for purposes of this part (other than for purposes of section 801), as if such policy were reinsured under a conventional coinsurance contract.

"(2) Consent of reinsured and reinsurer.

"Paragraph (1) shall apply to an insurance or annuity policy reinsured under a modified coinsurance contract only if the reinsured and reinsurer consent, in such manner as the Secretary or his delegate shall prescribe by regulations—

"(A) to the application of paragraph (1) to all insurance and annuity policies reinsured under such modified coinsurance contract, and

"(B) to the application of the rules provided by subsection (c) and the rules prescribed under such subsection.

"Such consent, once given, may not be rescinded except with the approval of the Secretary or his delegate.

"(b) Definition of modified coinsurance contract.

"For purposes of this section, the term 'modified coinsurance contract' means an indemnity reinsurance contract under the terms of which—

"(1) a life insurance company (hereinafter referred to as 'the rein-

problem different from the one presented here, is simply unintelligible if Congress thought that § 801 embodied an unvarying rule that reserves follow the risk.

A conventional coinsurance contract is a particular form of indemnity reinsurance.[28] The reinsurer agrees to reimburse the ceding company for a stated portion of obligations arising out of the covered policies. In return, the reinsurer receives a similar portion of all premiums received by the insurer, less a ceding commission to cover the insurer's overhead. The reinsurer sets up the appropriate reserve for its proportion of the obligation and, as is customary, the ceding company takes

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surer') agrees to indemnify another life insurance company (hereinafter referred to as 'the reinsured') against a risk assumed by the reinsured under the insurance or annuity policy reinsured,

"(2) the reinsured retains ownership of the assets in relation to the reserve on the policy reinsured,

"(3) all or part of the gross investment income derived from such assets is paid by the reinsured to the reinsurer as a part of the consideration for the reinsurance of such policy, and

"(4) the reinsurer is obligated for expenses incurred, and for Federal income taxes imposed, in respect of such gross investment income.

"(c) Special rules.

"Under regulations prescribed by the Secretary or his delegate, in applying subsection (a)(1) with respect to any insurance or annuity policy the following rules shall (to the extent not improper under the terms of the modified coinsurance contract under which such policy is reinsured) be applied in respect of the amount of such policy reinsured:

. . . . .

"(3) Reserves and assets.

"The reserve on the policy reinsured shall be treated as a part of the reserves of the reinsurer and not of the reinsured, and the assets in relation to such reserve shall be treated as owned by the reinsurer and not by the reinsured."

[28] Coinsurance carries a substantially different meaning in the life insurance field than it does in the case of liability or property insurance. See Steffen, Life and Health Reinsurance, in Life and Health Insurance Handbook 1035 n. 1 (D. Gregg ed. 1964); S. Huebner, K. Black, & R. Cline, Property and Liability Insurance 95–100 (2d ed. 1976).

credit against its reserves for the portion of the risks reinsured.

A modified coinsurance contract is a further variation in this esoteric area of insurance. As explained before the Senate Finance Committee, a modified form of coinsurance developed because some major reinsurers were not licensed to do business in New York, and New York did not permit a ceding company to take credit against its reserves for business reinsured with unlicensed companies. Hearings on H. R. 4245 before the Senate Committee on Finance, 86th Cong., 1st Sess., 608 (1959) (statement of Henry F. Rood). Denial of credit places the ceding company in an undesirable position. It has depleted its assets by paying to the reinsurer the latter's portion of premiums, but its liability account for reserves remains unchanged. Few companies would accept the resulting drain on surplus, and unlicensed reinsurers wishing to retain New York business began offering a modified form of coinsurance contract. Obligations would be shared as before, but the ceding company, which must in any event maintain 100% of the reserves, would be permitted to retain and invest the assets backing the reserves. As consideration for this right of retention, modified coinsurance contracts require the ceding company to pay to the reinsurer, under a complicated formula, the investment income on the reinsurer's portion of the investments backing the reserve. See *id.*, at 609; E. Wightman, Life Insurance Statements and Accounts 150–151 (1952); D. McGill, Life Insurance 435–440 (rev. ed. 1967).

The 1959 legislation, as it passed the House, contained no special treatment for these modified contracts. The income involved therefore would have been taxed twice, once as investment income to the ceding company and then as underwriting income to the reinsurer.[29] The Senate thought this double taxation inequitable, and therefore added § 820, to which the House agreed. That section provides that for tax

[29] This was not a problem under prior law, since the underwriting income of life insurance companies was not taxed.

purposes modified coinsurance contracts shall be treated the same as conventional coinsurance contracts, if the contracting parties consent to such treatment. For consenting companies Congress not only provided that gross investment income shall be treated as if it were received directly (in appropriate share) by the reinsurer, § 820 (c)(1), but also expressly declared that the reserves "shall be treated as a part of the reserves of the reinsurer and not of the reinsured." § 820 (c)(3).

Under a modified coinsurance contract the reinsurer bears the risk on its share of the obligations. Thus, if § 801 mandates that reserves follow the risk, the reinsurer could not escape being considered as holding its share of the reserve. Section 820 (c)(3), providing for attribution of the reserves to the reinsurer, would be an elaborate redundancy. And although § 820 (a)(2) specifies that attribution under § 820 is optional, requiring the consent of the parties, the parties would in fact have no option at all. Plainly § 820 is incompatible with a view that § 801 embodies a rule that reserves follow the risk.[30]

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[30] This conclusion is not weakened by the provision in § 820 (a)(1) that the special treatment under § 820 shall not apply for purposes of § 801. This exception simply means that for purposes of § 801 the reserves are invariably treated as held by the ceding company; the companies are unable to elect to have those reserves follow the risk. Cf. Rev. Rul. 70–508, 1970–2 Cum. Bull. 136, described in the text *infra*.

The Government argues that § 820 has no bearing on attribution of A&H reserves since it applies only to reinsurance agreements in the life insurance field. We find this unpersuasive. The Government derives its "reserves follow the risk" rule from the definition of "reserve" and the fact that a reserve is a liability, not an asset. See *supra*, at 739–740. Life reserves are as much liabilities as are A&H reserves. Although there are important differences in the ways the two are computed, see n. 20, *supra*, none of those differences are germane to the reasoning by which the Government derives its rule. Either the "reserves follow the risk" rule is valid for all insurance risks or it is valid for none.

The Commissioner himself, interpreting § 801 in light of § 820, has implicitly acknowledged that reserves do not follow the risk. Rev. Rul. 70–508, 1970–2 Cum. Bull. 136. Advice was requested by the parties to a modified coinsurance contract who had not elected the special treatment available under § 820. The ceding company had carried the life insurance reserves on its books, although the reinsurer bore the ultimate risk. The ceding company wanted to know whether it could count those reserves in its ratio for purposes of § 801. Relying on § 801 (b) and the Treasury Regulations implementing it, the Commissioner ruled that it could. A "reserves follow the risk" rule would have dictated precisely the opposite result.

D

Section 820 affords an unmistakable indication that § 801 does not impose the "reserves follow the risk" rule. Instead, Congress intended to rely on customary accounting and actuarial practices, leaving, as § 820 makes evident, broad discretion to the parties to a reinsurance agreement to negotiate their own terms. This does not open the door to widespread abuse. "Congress was aware of the extensive, continuing supervision of the insurance industry by the states. It is obvious that subjecting the reserves to the scrutiny of the state regulatory agencies is an additional safeguard against overreaching by the companies." *Mutual Benefit Life Ins. Co.* v. *Commissioner*, 488 F. 2d 1101, 1108 (CA3 1973), cert. denied, 419 U. S. 882 (1974). See *Lamana-Panno-Fallo Industrial Ins. Co.* v. *Commissioner*, 127 F. 2d 56, 58–59 (CA5 1942); *Alinco Life Ins. Co.* v. *United States*, 178 Ct. Cl., at 831, 373 F. 2d, at 345. See also *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429–433 (1946); 15 U. S. C. § 1011 (McCarran-Ferguson Act). In presenting the 1959 legislation to the full House, members of the committee that drafted the bill were careful to underscore the continuing primacy of state

regulation, with specific reference to the question of reserves.[31]

In two of the cases before us the courts below expressly found that the reserves were held in accordance with accepted actuarial and accounting standards,[32] while the third court did not address the issue. In all three, it was found that no state insurance department required any change in the way the taxpayers computed and reported their reserves.[33] Since the taxpayers neither held the unearned premium dollars nor set up the corresponding unearned premium reserves, and since that treatment was in accord with customary practice as policed by the state regulatory authorities, we hold that § 801 (c)(2) does not permit attribution to the taxpayers of the reserves held by the other parties to the reinsurance treaties.[34]

V

The Government argues that even if attribution of reserves is not required under § 801 (c)(2), attribution is required

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[31] See 105 Cong. Rec. 2569, 2576–2577 (1959) (remarks of Reps. Mills and Simpson, chairman and ranking minority member, respectively, of the Subcommittee on Internal Revenue Taxation).

[32] See *Consumer Life*, No. 75–1221, Pet. for Cert. 108a (Finding of Fact No. 47); *First Railroad*, No. 75–1260, Pet. for Cert. 16a (finding by the District Court; the Court of Appeals did not take issue with this finding).

[33] *Consumer Life*, 207 Ct. Cl., at 643–647, 524 F. 2d, at 1170–1172; *First Railroad*, No. 75–1260, Pet. for Cert. 16a (finding by the District Court), noted without disapproval by the Court of Appeals, 514 F. 2d, at 677 n. 8; *Penn Security*, 207 Ct. Cl., at 599, 524 F. 2d, at 1157. See also *Penn Security*, No. 75–1285, Pet. for Cert. 48a (Finding of Fact No. 29).

[34] The current statute bases the § 801 determination on reserves, not on other criteria Congress could have chosen that might arguably give a better indication of the relative importance of a company's life insurance business. See *Economy Finance Corp.* v. *United States*, 501 F. 2d, at 483 (Stevens, J., dissenting). We, of course, are called upon to apply the statute as it is written. Furthermore, the interpretation for which the Government contends "would have wide ramifications which we are not prepared to visit upon taxpayers, absent congressional guidance in this direction." *Commissioner* v. *Brown*, 380 U. S., at 575. If changes are thought necessary, that is Congress' business.

under § 801 (c)(3), counting in total reserves "all other insurance reserves required by law." See n. 4, *supra*. Under state statutory law, the Government suggests, these taxpayers were required to set up and maintain the full unearned premium reserves.

Our attention is drawn to no statute in any of the affected States that expressly requires this result. Instead the Government returns to its main theme and asserts, in essence, that certain general state statutory provisions embody the doctrine that reserves follow the risk.[35] We would find it difficult to infer such a doctrine from the statutory provisions relied on by the Government even if there were no other indications to the contrary. But other indications are compelling. The insurance departments of the affected States consistently accepted annual reports showing reserves held as the taxpayers claim they should be.[36] It is well established

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[35] For example, Ariz. Rev. Stat. Ann. § 20–506 (1975) provides in part that "every insurer shall maintain an unearned premium reserve on all policies in force." Under § 20–104, "'Insurer' includes every person engaged in the business of making contracts of insurance." Section 20–103 of the Arizona statute defines "insurance" as "a contract whereby one undertakes to indemnify another . . . ." After summarizing these provisions the Government concludes: "The significant aspect of these state statutes is that they require the establishment of a reserve by the company that is ultimately liable to meet policy claims whether or not it has actually received the premiums for the coverage." Brief for United States 69–70. We do not think these general provisions can be read to support such a sweeping conclusion.

[36] In *Consumer Life* and *First Railroad* the Government introduced the testimony of certain insurance department officials from Arizona and Georgia. They indicated that the omission of unearned premium reserves from these two taxpayers' annual reports was permitted "unwittingly" or only because the departments were unfamiliar at the time with these types of reinsurance agreements. But we do not think this after-the-fact testimony from single officials should outweigh the formal, official approval rendered under the names of the commissioners after opportunity for full review. Moreover, this formal approval withstood careful triennial audits. See n. 12, *supra*.

that the consistent construction of a statute "by the agency charged with its enforcement is entitled to great deference by the courts." *NLRB* v. *Boeing Co.*, 412 U. S. 67, 75 (1973). See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 210 (1972); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944). This is no less the rule when federal courts are interpreting state law administered by state regulatory officials,[37] at least where, as here, there is no reason to think that the state courts would construe the statute differently. We find no basis for holding that taxpayers were required by law, within the meaning of § 801 (c)(3), to maintain the disputed unearned premium reserves.[38]

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[37] The relevant Treasury Regulations also seem to make state practice determinative:

"[T]he term 'reserves required by law' means reserves which are required either by express statutory provisions or by rules and regulations of the insurance department of a State, Territory, or the District of Columbia when promulgated in the exercise of a power conferred by statute, *and* which are *reported in the annual statement of the company and accepted by state regulatory authorities* as held for the fulfillment of the claims of policyholders or beneficiaries." Treas. Reg. § 1.801–5 (b) (1960) (emphasis added).

See also § 1.801–5 (a) (indicating that the reserve "must have been actually held during the taxable year for which the reserve is claimed").

[38] The Government suggests that state regulatory practice cannot be deemed controlling under the doctrine of *McCoach* v. *Insurance Co. of North America*, 244 U. S. 585 (1917) and the many cases in this Court that followed it. See, *e. g.*, *United States* v. *Boston Ins. Co.*, 269 U. S. 197 (1925); *New York Ins. Co.* v. *Edwards*, 271 U. S. 109 (1926); *Helvering* v. *Inter-mountain Life Ins. Co.*, 294 U. S. 686 (1935). Those cases held that certain reserves mandated by state insurance authorities were not reserves "required by law" within the meaning of the early Revenue Acts, because they were not technical insurance reserves. In those cases, however, the question was not whether the taxpayers qualified for preferential tax treatment. Rather, the question was whether the taxpayers would be allowed a deduction for additions to various reserves, and the skeletal provisions of the earlier Acts necessitated a restrictive view. See *McCoach*,

VI

For the reasons stated, we hold for the taxpayers. The judgments in Nos. 75–1221 and 75–1285 are affirmed. The judgment in No. 75–1260 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court today makes it possible for insurance companies doing almost no life insurance business to qualify for major tax advantages Congress meant to give only to companies doing mostly life insurance business. I cannot join in the creation of this truckhole in the law of insurance taxation.

I

Congress has chosen to give life insurance companies extremely favorable federal income tax treatment. The reason for this preferential tax treatment is the nature of life insurance risks. They are long-term risks that increase over the period of coverage and that will ultimately require the payment of a claim. Companies that assume life insurance risks therefore must accumulate substantial reserve funds to meet future claims; these reserve funds are invested, and a large portion of the investment income is then added to the funds already accumulated. In recognition of the special

supra, at 589. The same restrictive view is not appropriate for purposes of applying § 801. See *National Protective Ins. Co.* v. *Commissioner*, 128 F. 2d 948, 950–952 (CA8), cert denied, 317 U. S. 655 (1942). Moreover, those early cases generally have little bearing on questions that arise under the more recent enactments. The definition of "life insurance reserves" that now appears in § 801 (b), and which originated with the 1942 Revenue Act, substantially replaced the problematic concept of technical reserves developed in *McCoach*. See *United States* v. *Occidental Life Ins. Co.*, 385 F. 2d 1, 4–7 (CA9 1967).

characteristics of life insurance risks, Congress has allowed a substantial portion of life insurance company income to escape taxation.[1]

Other types of insurance, such as the accident and health (A&H) coverage provided by the taxpayers in these cases, do not involve the assumption of long-term risks that inevitably will require the payment of benefits at some point in the relatively distant future. Consequently, Congress has provided for taxation of such nonlife insurance companies in much the same manner as any other corporation. See Internal Revenue Code of 1954, §§ 831, 832, 26 U. S. C. §§ 831, 832. Many companies mix nonlife insurance business with their life insurance business, and Congress has decided to tax such "mixed" enterprises according to whether the majority of the company's business is life or nonlife:

> "[I]f this accident and health business was more than 50 per cent of their business, as measured by their reserves, it could not be treated as a life insurance company. On the other hand, if their accident and health insurance were incidental and represented less than 50 per cent of their business we treated them as a life insurance company." Hearings on H. R. 8245 before the Senate Committee on Finance, 67th Cong., 1st Sess., 85 (1921) (testimony of Dr. T. S. Adams, Tax Adviser to the Treasury Department), also quoted *ante*, at 743.

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[1] Life insurance company taxable income is calculated by a complicated three-stage process outlined in *Jefferson Standard Life Ins. Co.* v. *United States*, 408 F. 2d 842, 844–846 (CA4), cert. denied, 396 U. S. 828 (1969). The end result of these intricate calculations is a substantial narrowing of the tax base of such companies. See Clark, The Federal Income Taxation of Financial Intermediaries, 84 Yale L. J. 1603, 1637–1664 (1975). In addition to deferring taxation on 50% of underwriting income, *ante*, at 728 n. 2, life insurance companies are not taxed on an estimated 70% to 75% of their net investment income. Clark, *supra*, at 1642–1643, and n. 152. See *United States* v. *Atlas Life Ins. Co.*, 381 U. S. 233, 236–237, 247–249 (1965).

In order to measure the proportion of life insurance business done by an insurance company, Congress used the fraction of total insurance reserves consisting of life insurance reserves, as defined by § 801. The purpose of this reserve-ratio test is, of course, to determine whether a majority of an insurance company's business is life insurance.[2]

More than 50% of the business of the taxpayer insurance companies for the taxable years in question here was nonlife rather than life insurance business, as measured by the reserves accumulated to cover all life and nonlife risks assumed by the taxpayers.[3] The taxpayers sought to obtain preferential treatment as life insurance companies under § 801 by arranging with other companies to hold the necessary reserves for the taxpayers. I agree with the majority that these arrangements had economic substance in that the companies holding the reserves performed two additional

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[2] In order to qualify under § 801 as a "life insurance company," the taxpayer first must qualify as an "insurance company." For this purpose, as well as for qualifying as a "life insurance company," the "primary and predominant business activity" of the company determines its tax status: "The term 'insurance company' means a company whose primary and predominant business activity during the taxable year is the issuing of insurance or annuity contracts or the reinsuring of risks underwritten by insurance companies. Thus, though its name, charter powers, and subjection to State insurance laws are significant in determining the business which a company is authorized and intends to carry on, *it is the character of the business actually done in the taxable year which determines whether a company is taxable as an insurance company* under the Internal Revenue Code." Treas. Reg. § 1.801–3 (a)(1) (1972). (Emphasis added.)

[3] The majority assumes that "the taxpayers did take on all substantial risks" under the arrangements by which the A&H reserves in relation to these risks were held by other companies. *Ante*, at 740. The taxpayers concede and the courts below found that if these A&H reserves are attributable to the taxpayers, they do not qualify as life insurance companies under the reserve-ratio test. 207 Ct. Cl. 638, 645, 524 F. 2d 1167, 1171 (1975); 207 Ct. Cl. 594, 604–605, 524 F. 2d 1155, 1160 (1975); 514 F. 2d 675 (CA5 1975).

functions for the taxpayers: a clearinghouse function, collecting premiums and paying out claims, and a financing function, lending the difference between the reserves established for the policy and the premiums, less selling expenses, received from the policyholder. See *ante*, at 737–738, and n. 16; *Economy Finance Corp.* v. *United States*, 501 F. 2d 466, 477–478 (CA7 1974), cert. denied, 420 U. S. 947, rehearing denied, 421 U. S. 922 (1975), motion for leave to file second petition for rehearing pending, No. 74–701. But I cannot agree that these arrangements enable the taxpayers to qualify for tax savings Congress intended to give only to insurance companies whose predominant business is the assumption of insurance risks.

II

The majority holds that the taxpayers may obtain these tax savings despite the predominantly nonlife character of their insurance business, "[s]ince the taxpayers neither held the unearned [A&H] premium dollars nor set up the corresponding unearned premium reserves, and since that treatment was in accord with customary practice as policed by the state regulatory authorities . . . ." *Ante*, at 750. This rule would permit an A&H insurance company to qualify for preferential treatment as a life insurance company by selling a few life policies and then arranging, by means similar to those employed here, for a third party to hold the A&H premiums and the corresponding reserves. Under the majority's rule, these reserves held by the third party to cover risks assumed by the A&H company would not be attributed to that company; its total reserves for purposes of § 801 would consist almost entirely of whatever life insurance reserves it held; and the company would satisfy the reserve-ratio test.[4] I

[4] The majority evidently hopes that state regulatory authorities will prevent "widespread abuse" of this type, *ante*, at 749, by requiring a company assuming insurance risks to hold the corresponding reserves. But, as the Court of Claims below in No. 75–1221 observed, the goal of

cannot believe that Congress intended to allow an insurance company to shelter its nonlife insurance income from taxation merely by assuming an incidental amount of life insurance risks and engaging another company to hold its reserves through arrangements with the requisite economic substance and state regulatory approval to satisfy the standard announced by the majority today.

The language of § 801 and its accompanying regulations does not require such a result. Section 801 (a) provides that any insurance company may qualify as a life insurance company "if *its* life insurance reserves . . . comprise more than 50 percent of *its* total reserves . . ." (emphasis added); § 801 (c)(2) includes "unearned premiums" in the definition

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state insurance regulation is not to protect the federal treasury from tax avoidance by insurance companies doing predominantly nonlife business, but rather to protect policyholders by making sure that funds are set aside out of premium receipts for payment of claims. 207 Ct. Cl., at 645, 524 F. 2d, at 1171. The majority suggests no reason why, as long as the insurer has made some arrangement for the establishment of reserves, the state regulatory authorities will care who holds them.

The majority's hope that the States will prevent insurance companies from taking advantage of the loophole it has created is further undermined by its holding that the A&H reserves involved in these cases were not attributable to the taxpayers under § 801 (c)(3) as "other insurance reserves required by [state] law." *Ante*, at 750–752. The majority reasons that the taxpayers were not required by state law to maintain these A&H reserves because "[t]he insurance departments of the affected States consistently accepted annual reports showing reserves held as the taxpayers claim they should be." *Ante* at 751. (Footnote omitted.) The majority relies on this failure of state regulatory authorities to require inclusion of the A&H reserves in the taxpayers' annual statements, despite uncontradicted testimony of state insurance officials that the reason for this failure was the state officials' unfamiliarity with these particular arrangements purporting to shift reserves to non-risk-bearing companies. *Ante*, at 751 n. 36. Thus, if a company's arrangements for shifting reserve allocations are sufficiently novel, complex, or well disguised in its annual statements to escape detection by state insurance officials, state regulation will not help at all to close the door to widespread federal income tax avoidance.

of "total reserves" for purposes of § 801 (a). It is clear that, as required by Treasury Regulations, unearned premium reserves were set up to "cover the cost of carrying the [A&H] insurance risk for the period for which the premiums have been paid in advance," Treas. Reg. § 1.801–3 (e) (1972), and that these reserves "have been actually held during the taxable year[s]" at issue here. § 1.801–5 (a)(3) (1960). The question is whether the A&H reserves set up to cover risks assumed by each taxpayer are considered to be "its" reserves even though they are in the physical possession and under the nominal control of another company.

The Regulations explicitly answer this question in the affirmative for life insurance reserves:

> "[Life insurance] *reserves held by the company with respect to the net value of risks reinsured in other solvent companies . . . shall be deducted from the company's life insurance reserves.* For example, if an ordinary life policy with a reserve of $100 is reinsured in another solvent company on a yearly renewable term basis, and the reserve on such yearly renewable term policy is $10, the reinsured company shall include $90 ($100 minus $10) in determining its life insurance reserves." § 1.801–4 (a)(3) (1972). (Emphasis added.)

Accord, § 1.801–4 (d)(5). Thus, for purposes of the reserve-ratio test of § 801, life insurance reserves are attributable to the company assuming the risk under a reinsurance agreement. The same attribution rule should be used in calculating the denominator of the reserve ratio (life plus nonlife reserves) as for the numerator (life reserves); as the majority recognizes, *ante,* at 748 n. 30, there is no reason not to adopt a consistent approach to allocation of both life and nonlife reserves in determining life insurance company status.

The rule that life and nonlife reserves are attributable to the risk bearer reflects the familiar principles of cases such as *Lucas* v. *Earl,* 281 U. S. 111 (1930), where income earned by

a taxpayer was attributed to him notwithstanding a contractual arrangement under which the income was paid over to a third party. In that case, the salary derived from the taxpayer's business activity was treated as "his" income even though he did not receive or hold it. Similarly, the reserves applicable to the A&H insurance business of each of the taxpayers here should be treated as "its" reserves. Cf. *Commissioner* v. *Hansen*, 360 U. S. 446 (1959).[5]

III

The majority insists nonetheless that these predominantly nonlife insurance companies be given preferential tax treatment intended only for predominantly life insurance companies. To reach this result, the majority relies, not on the language or legislative history of the § 801 reserve-ratio test, but on § 820 of the Code, which was added nearly 40 years after the reserve-ratio test was adopted and which gives life insurance companies the choice of whether to have reserves

[5] In *Hansen*, accrual-basis automobile dealers had sold customer installment obligations to finance companies, who required the dealers to reimburse them for losses arising from nonpayment by the customers. To cover this risk of loss, the dealers retained a portion of the purchase price of the obligations as a reserve. The funds in these reserve accounts were ultimately paid over to the dealers, less amounts applied to cover the losses from nonpayment. The Court held that these reserve accounts were income that accrued to the dealers when the accounts were established, because at that time the reserve funds "were vested in and belonged to the respective dealers, subject only to their . . . contingent liabilities to the finance companies." 360 U. S., at 463. Similarly, the taxpayers in these cases allowed other parties to retain the purchase price of A&H insurance policies and to apply part of those funds to the payment of taxpayers' contingent liabilities under the A&H policies; the balance, as in *Hansen*, was remitted to the taxpayers. These reserves, like the dealer reserves held by the finance companies in *Hansen*, should be attributed to the risk bearers for tax purposes.

The majority distinguishes *Hansen* by fiat, stating only that "[l]ife insurance accounting is a world unto itself." *Ante*, at 739 n. 18. This is hardly a reason to ignore accepted principles of federal income taxation.

under certain "modified coinsurance contracts" attributed to the reinsurer who bears the risk or to the reinsured who holds the reserves under the contract. See *ante*, at 745–748. The majority finds this section at once "redundan[t]" and "incompatible" with the Commissioner's interpretation of § 801. *Ante*, at 748. What the majority overlooks is that § 820 applies *only* to companies that have *already qualified as life insurance companies* by virtue of § 801; it prescribes, not how those companies qualify for life insurance company status, but rather how they are to be taxed once they have qualified for such status—specifically, how they can avoid double taxation on investment income received by the reinsurer but paid over to the reinsured pursuant to the particular type of reinsurance contract defined in § 820 (b). The option to attribute reserves for these contracts either to the reinsurer or the reinsured is given only to life insurance companies which qualify under § 801, see § 820 (b)(1), and is expressly made inapplicable "for purposes of section 801" in determining whether they so qualify, § 820 (a)(1).

The majority notes that § 820 (a)(1) denies insurance companies the choice of how to allocate their modified coinsurance contract reserves for purposes of the § 801 reserve-ratio test, but interprets this exception to § 820 to "[mean] that for purposes of § 801 the reserves are invariably treated as held by the ceding company. . . ." *Ante*, at 748 n. 30. This "explanation" simply assumes the conclusion that the majority is attempting to justify: What the parties to these cases are arguing about is whether for § 801 purposes reserves are invariably attributable to the company holding them rather than to the company bearing the risks that the reserves were set up to cover. Mandatory attribution to the risk bearer under § 801 is just as consistent with the inapplicability of the § 820 option as is mandatory attribution to the holder of those reserves, and is more consistent with the attribution rule prescribed by the Regulations for life insurance reserves. See

supra, at 758. Moreover, the definition of nonlife reserves under §§ 801 (c)(2) and (3) is explicitly made applicable only "[f]or purposes of [the] subsection [801] (a)" reserve-ratio test. The attribution rule at issue in these cases thus does not apply to the § 820 rules for taxing the income of life insurance companies from modified coinsurance contracts (or to the taxation of any other insurance income). In short, the majority's conclusion that § 820 "affords an unmistakable indication" of congressional intent with respect to attribution of reserves under § 801, *ante*, at 749, is refuted by the language of the Code itself.[6]

For the reasons stated, I respectfully dissent.

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[6] The majority attempts to find support for its position in a Revenue Ruling requested by the parties to a modified coinsurance contract under § 820 (b). Rev. Rul. 70-508, 1970-2 Cum. Bull. 136. As permitted by § 820 (a), the parties chose to attribute to the reinsured company the reserves on the portion of the risks reinsured with the other company. The reinsured company was assumed to be a life insurance company for purposes of § 801; the question was how its reserves should be calculated for purposes of the tax on life insurance companies imposed under § 802. See Rev. Rul. 70-508, *supra*. Because the definition of life insurance company reserves in § 801 (b) is used to define "life insurance company taxable income" under § 802, see §§ 802 (b), 804 (a)(1), 805 (a) and (c), the Commissioner had to decide whether the reserves in question were within the § 801 (b) definition for purposes of calculating the tax imposed under § 802. In ruling that the reserves did come within this definition, the Commissioner did not decide how reserves should be attributed for companies seeking to qualify for life insurance company status. That issue was not before him, because the companies had already qualified.

TRIMBLE ET AL. *v.* GORDON ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 75-5952. Argued December 7, 1976—Decided April 26, 1977

Section 12 of the Illinois Probate Act, which allows illegitimate children to inherit by intestate succession only from their mothers (though under Illinois law legitimate children may inherit by intestate succession from both their mothers and their fathers), *held* to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 766–776.

(a) A classification based on illegitimacy such as that challenged here is not "suspect" so as to require that it survive "strict scrutiny," *Mathews* v. *Lucas*, 427 U. S. 495, 506. Nevertheless, this Court requires, "at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose," *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 172, and the Court's previous decisions in this area show that the standard is "not a toothless one." *Mathews* v. *Lucas*, *supra*, at 510. P. 767.

(b) Section 12 cannot be justified on the ground that it promotes legitimate family relationships. A State may not attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. Pp. 768–770.

(c) Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. Section 12 is not "carefully tuned to alternative considerations," *Mathews* v. *Lucas*, *supra*, at 513, as is illustrated by the fact that in the instant case the decedent had been determined to be the appellant child's father in a state-court paternity action. Pp. 770–773.

(d) The fact that appellant's father could have provided for her by making a will does not save § 12 from invalidity under the Equal Protection Clause. Pp. 773–774.

(e) Though appellees contend that § 12 should be sustained on the theory that it represents the legislature's attempt to mirror the intent of Illinois decedents, the Illinois Supreme Court in construing the law did not rely upon a theory of presumed intent, and this Court's own examination of the statutory provision discloses no such legislative intent; rather, as the State Supreme Court indicated, § 12's primary purpose was to provide a system of intestate succession more just to

illegitimate children than the previous law, tempered by the secondary interest in protecting against spurious paternity claims. Pp. 774–776.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 776. REHNQUIST, J., filed a dissenting opinion, *post*, p. 777.

James D. Weill argued the cause for appellants. With him on the briefs were *Devereux Bowly*, *Charles Linn*, and *Jane G. Stevens*.

Miles N. Beermann argued the cause for appellees. With him on the brief was *Fred Klinsky*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

At issue in this case is the constitutionality of § 12 of the Illinois Probate Act[1] which allows illegitimate children to inherit by intestate succession only from their mothers. Under Illinois law, legitimate children are allowed to inherit by intestate succession from both their mothers and their fathers.[2]

I

Appellant Deta Mona Trimble is the illegitimate daughter

**Eric M. Lieberman*, *Norman Dorsen*, *Melvin Wulf*, and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

[1] Ill. Rev. Stat. c. 3, § 12 (1973). Effective January 1, 1976, § 12 and the rest of the Probate Act of which it was a part were repealed and replaced by the Probate Act of 1975, Public Act 79–328. Section 12 has been replaced by Ill. Rev. Stat. c. 3, § 2–2 (1976). Although § 2–2 of the Probate Act of 1975 differs in some respects from the old § 12, that part of § 12 that is at issue here was recodified without material change in § 2–2. As the opinions below and the briefs refer to the disputed statutory provision as § 12, we will continue to refer to it that way.

[2] Ill. Rev. Stat. c. 3, § 2–1 (b) (1976).

of appellant Jessie Trimble [3] and Sherman Gordon. Trimble and Gordon lived in Chicago with Deta Mona from 1970 until Gordon died in 1974, the victim of a homicide. On January 2, 1973, the Circuit Court of Cook County, Ill., had entered a paternity order finding Gordon to be the father of Deta Mona and ordering him to pay $15 per week for her support.[4] Gordon thereafter supported Deta Mona in accordance with the paternity order and openly acknowledged her as his child. He died intestate at the age of 28, leaving an estate consisting only of a 1974 Plymouth automobile worth approximately $2,500.

Shortly after Gordon's death, Trimble, as the mother and next friend of Deta Mona, filed a petition for letters of administration, determination of heirship, and declaratory relief in the Probate Division of the Circuit Court of Cook County, Ill. That court entered an order determining heirship, identifying as the only heirs of Gordon his father, Joseph Gordon, his mother, Ethel King, and his brother, two sisters, and a half brother.[5] All of these individuals are appellees in this appeal, but only appellee King has filed a brief.

The Circuit Court excluded Deta Mona on the authority of the negative implications of § 12 of the Illinois Probate Act, which provides in relevant part:

> "An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would

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[3] There is some dispute over the status of Jessie Trimble in this litigation. It has been argued that she is in the case only as the next friend of her daughter. As the question is relevant only to the claim of sex discrimination against the mothers of illegitimate children, an issue we do not reach, we need not resolve the dispute.

[4] App. 8.

[5] *Id.*, at 14.

> have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate." [6]

If Deta Mona had been a legitimate child, she would have inherited her father's entire estate under Illinois law.[7] In rejecting Deta Mona's claim of heirship, the court sustained the constitutionality of § 12.

After a notice of appeal was filed, the Illinois Supreme Court entered an order allowing direct appeal of the decision of the Circuit Court, bypassing the Illinois Appellate Court. Appellants were granted leave to file an *amicus* brief in two pending consolidated appeals which presented similar challenges to the constitutionality of § 12. On June 2, 1975, the Illinois Supreme Court handed down its opinion in *In re Estate of Karas*, 61 Ill. 2d 40, 329 N. E. 2d 234 (1975), sustaining § 12 against all constitutional challenges, including those presented in appellants' *amicus* brief.[8] On September 24, 1975, oral argument was held in the instant case. Chief Justice Underwood orally delivered the opinion of the court from the bench, affirming the decision of the Circuit Court on the authority of *Karas*. A final judgment was entered on October 15, 1975.[9]

We noted probable jurisdiction to consider the arguments that § 12 violates the Equal Protection Clause of the Fourteenth Amendment by invidiously discriminating on the basis of illegitimacy and sex.[10] 424 U. S. 964 (1976). We

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[6] See n. 1, *supra*.

[7] See n. 2, *supra*.

[8] For purposes of its decision, the court assumed that the children had been acknowledged. There is no mention of a prior adjudication of paternity.

[9] App. 54–56.

[10] Not presented here is the appellants' contention below that § 12 discriminates on the basis of race because of its alleged disproportionate impact on Negroes.

now reverse. As we conclude that the statutory discrimination against illegitimate children is unconstitutional, we do not reach the sex discrimination argument.

II

In *Karas*, the Illinois Supreme Court rejected the equal protection challenge to the discrimination against illegitimate children on the explicit authority of *Labine* v. *Vincent*, 401 U. S. 532 (1971). The court found that § 12 is supported by the state interests in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death. The court also found the Illinois law unobjectionable because no "insurmountable barrier" prevented illegitimate children from sharing in the estates of their fathers. By leaving a will, Sherman Gordon could have assured Deta Mona a share of his estate.

Appellees endorse the reasoning of the Illinois Supreme Court and suggest additional justifications for the statute. In weighing the constitutional sufficiency of these justifications, we are guided by our previous decisions involving equal protection challenges to laws discriminating on the basis of illegitimacy.[11] "[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber* v. *Aetna*

[11] This case represents the 12th time since 1968 that we have considered the constitutionality of alleged discrimination on the basis of illegitimacy. The previous decisions are as follows: *Mathews* v. *Lucas*, 427 U. S. 495 (1976); *Beaty* v. *Weinberger*, 478 F. 2d 300 (CA5 1973), summarily aff'd, 418 U. S. 901 (1974); *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *New Jersey Welfare Rights Org.* v. *Cahill*, 411 U. S. 619 (1973); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (Md.), summarily aff'd, 409 U. S. 1069 (1972); *Davis* v. *Richardson*, 342 F. Supp. 588 (Conn.), summarily aff'd, 409 U. S. 1069 (1972); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Labine* v. *Vincent*, 401 U. S. 532 (1971); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73 (1968); *Levy* v. *Louisiana*, 391 U. S. 68 (1968).

Casualty & Surety Co., 406 U. S. 164, 172 (1972). In this context, the standard just stated is a minimum; the Court sometimes requires more. "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . ." *Ibid.*

Appellants urge us to hold that classifications based on illegitimacy are "suspect," so that any justifications must survive "strict scrutiny." We considered and rejected a similar argument last Term in *Mathews* v. *Lucas*, 427 U. S. 495 (1976). As we recognized in *Lucas*, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. *Id.*, at 505. We nevertheless concluded that the analogy was not sufficient to require "our most exacting scrutiny." *Id.*, at 506. Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that the scrutiny "is not a toothless one," *id.*, at 510, a proposition clearly demonstrated by our previous decisions in this area.[12]

III

The Illinois Supreme Court prefaced its discussion of the state interests served by § 12 with a general discussion of

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[12] See cases cited n. 11, *supra*. *Labine* v. *Vincent*, *supra*, is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent. In *Weber* v. *Aetna Casualty & Surety Co.*, *supra*, we found in *Labine* a recognition that judicial deference is appropriate when the challenged statute involves the "substantial state interest in providing for 'the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents' . . . ." 406 U. S., at 170, quoting *Labine* v. *Vincent*, 229 So. 2d 449, 452 (La. App. 1969). We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination. Although the proposition is self-evident, *Reed* v. *Reed*, 404 U. S. 71 (1971),

the purpose of the statute. Quoting from its earlier opinions, the court concluded that the statute was enacted to ameliorate the harsh common-law rule under which an illegitimate child was *filius nullius* and incapable of inheriting from anyone. 61 Ill. 2d, at 44–45, 329 N. E. 2d, at 236–237. Although § 12 did not bring illegitimate children into parity with legitimate children, it did improve their position, thus partially achieving the asserted objective. The sufficiency of the justifications advanced for the remaining discrimination against illegitimate children must be considered in light of this motivating purpose.

A

The Illinois Supreme Court relied in part on the State's purported interest in "the promotion of [legitimate] family relationships." 61 Ill. 2d, at 48, 329 N. E. 2d, at 238. Although the court noted that this justification had been accepted in *Labine*, the opinion contains only the most perfunctory analysis. This inattention may not have been an oversight, for § 12 bears only the most attenuated relationship to the asserted goal.[13]

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demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny. See also *Eskra* v. *Morton*, 524 F. 2d 9, 13 (CA7 1975) (Stevens, J.). The more specific analysis of *Labine* is discussed throughout the remainder of this opinion.

[13] This purpose is not apparent from the statute. Penalizing children as a means of influencing their parents seems inconsistent with the desire of the Illinois Legislature to make the intestate succession law more just to illegitimate children. Moreover, the difference in the rights of illegitimate children in the estates of their mothers and their fathers appears to be unrelated to the purpose of promoting family relationships. In this respect the Louisiana laws at issue in *Labine* were quite different. Those laws differentiated on the basis of the character of the child's illegitimacy. "Bastard children" were given no inheritance rights. "Natural children," who could be and were acknowledged under state law, were given limited inheritance rights, but still less than those of legitimate children. 401 U. S., at 537, and n. 13. The Louisiana categories are

In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose. No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society. The flaw in the analysis lies elsewhere. As we said in *Lucas*, the constitutionality of this law "depends upon the character of the discrimination and its relation to legitimate legislative aims." 427 U. S., at 504. The court below did not address the relation between § 12 and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete. The same observation can be made about this Court's decision in *Labine*, but that case does not stand alone. In subsequent decisions, we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.

In *Weber* we examined a Louisiana workmen's compensation law which discriminated against one class of illegitimate children. Without questioning Louisiana's interest in protecting legitimate family relationships, we rejected the argument that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation." 406 U. S., at 173. Although *Weber* distinguished *Labine* on other grounds, the reasons for rejecting this justification are equally applicable here:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual re-

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consistent with a theory of social opprobrium regarding the parents' relationships and with a measured, if misguided, attempt to deter illegitimate relationships.

> sponsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." 406 U. S., at 175 (footnote omitted).

The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.

B

The Illinois Supreme Court relied on *Labine* for another and more substantial justification: the State's interest in "establish[ing] a method of property disposition." 61 Ill. 2d, at 48, 329 N. E. 2d, at 238. Here the court's analysis is more complete. Focusing specifically on the difficulty of proving paternity and the related danger of spurious claims, the court concluded that this interest explained and justified the asymmetrical statutory discrimination against the illegitimate children of intestate men. The more favorable treatment of illegitimate children claiming from their mothers' estates was justified because "proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors." *Id.*, at 52, 329 N. E. 2d, at 240. Alluding to the possibilities of abuse, the court rejected a case-by-case approach to claims based on alleged paternity. *Id.*, at 52–53, 329 N. E. 2d, at 240–241.

The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the

possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed.

The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area. Our previous decisions demonstrate a sensitivity to "the lurking problems with respect to proof of paternity," *Gomez* v. *Perez*, 409 U. S. 535, 538 (1973), and the need for the States to draw "arbitrary lines . . . to facilitate potentially difficult problems of proof," *Weber*, 406 U. S., at 174. "Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez, supra*, at 538. Our decision last Term in *Mathews* v. *Lucas, supra*, provides especially helpful guidance.

In *Lucas* we sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits. One of the statutory conditions of eligibility was dependency on the deceased wage earner. 427 U. S., at 498,

and n. 1. Although the Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court upheld the statutory classifications, finding them "reasonably related to the likelihood of dependency at death." *Id.*, at 509. Central to this decision was the finding that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Id.*, at 513.

Although the present case arises in a context different from that in *Lucas*, the question whether the statute "is carefully tuned to alternative considerations" is equally applicable here. We conclude that § 12 does not meet this standard. Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. The facts of this case graphically illustrate the constitutional defect of § 12. Sherman Gordon was found to be the father of Deta Mona in a state-court paternity action prior to his death. On the strength of that finding, he was ordered to contribute to the support of his child. That adjudication should be equally sufficient to establish Deta Mona's right to claim a child's share of Gordon's estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances.[14] The reach of the statute extends well

[14] Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.

beyond the asserted purposes. See *Jimenez* v. *Weinberger*, 417 U. S. 628, 637 (1974).

C

The Illinois Supreme Court also noted that the decedents whose estates were involved in the consolidated appeals could have left substantial parts of their estates to their illegitimate children by writing a will. The court cited *Labine* as authority for the proposition that such a possibility is constitutionally significant. 61 Ill. 2d, at 52, 329 N. E. 2d, at 240. The penultimate paragraph of the opinion in *Labine* distinguishes that case from *Levy* v. *Louisiana*, 391 U. S. 68 (1968),[15] because no insurmountable barrier prevented the illegitimate child from sharing in her father's estate. "There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father." 401 U. S., at 539. The Court then listed three different steps that would have resulted in some recovery by Labine's illegitimate daughter. Labine could have left a will; he could have legitimated the daughter by marrying her mother; and he could have given the daughter the status of a legitimate child by stating in his acknowledgment of paternity his desire to legitimate her. *Ibid.* In *Weber* our distinction of *Labine* was based in part on the fact that no such alternatives existed, as state law prevented the acknowledgment of the children involved. 406 U. S., at 170–171.

Despite its appearance in two of our opinions, the focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly. Here, as in *Labine*, the question is the constitutionality of a state intestate succession law that treats illegitimate children differently from legitimate children. Traditional equal protection analy-

[15] In *Levy* the Court struck down a Louisiana wrongful-death statute that gave legitimate, but not illegitimate, children a cause of action for the wrongful death of their parents.

sis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances.

By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. If the decedent had written a will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts. If Sherman Gordon had devised his estate to Deta Mona this case would not be here. Similarly, in *Reed* v. *Reed*, 404 U. S. 71 (1971), if the decedent had left a will naming an executor, the problem of the statutory preference for male administrators of estates of intestates would not have been presented. The opinion in *Reed* gives no indication that this available alternative had any constitutional significance. We think it has none in this case.

D

Finally, appellees urge us to affirm the decision below on the theory that the Illinois Probate Act, including § 12, mirrors the presumed intentions of the citizens of the State regarding the disposition of their property at death. Individualizing this theory, appellees argue that we must assume that Sherman Gordon knew the disposition of his estate under the Illinois Probate Act and that his failure to make a will shows his approval of that disposition. We need not

resolve the question whether presumed intent alone can ever justify discrimination against illegitimates,[16] for we do not think that § 12 was enacted for this purpose. The theory of presumed intent is not relied upon in the careful opinion of the Illinois Supreme Court examining both the history and the text of § 12. This omission is not without significance, as one would expect a state supreme court to identify the state interests served by a statute of its state legislature. Our own examination of § 12 convinces us that the statutory provisions at issue were shaped by forces other than the desire of the legislature to mirror the intentions of the citizens of the State with respect to their illegitimate children.

To the extent that other policies are not considered more important, legislators enacting state intestate succession laws probably are influenced by the desire to reflect the natural affinities of decedents in the allocation of estates among the

[16] Appellees characterize the Illinois intestate succession law as a "statutory will." Because intent is a central ingredient in the disposition of property by will, the theory that intestate succession laws are "statutory wills" based on the "presumed intent" of the citizens of the State may have some superficial appeal. The theory proceeds from the initial premise that an individual could, if he wished, disinherit his illegitimate children in his will. Because the statute merely reflects the intent of those citizens who failed to make a will, discrimination against illegitimate children in intestate succession laws is said to be equally permissible. The term "statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not of individuals. Under the Fourteenth Amendment this is a fundamental difference.

Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. With respect to any individual, the argument of knowledge and approval of the state law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of "presumed intent." See *Eskra* v. *Morton*, 524 F. 2d, at 12–14 (Stevens, J.).

categories of heirs. See *Mathews* v. *Lucas*, 427 U. S., at 514–515. A pattern of distribution favoring brothers and sisters over cousins is, for example, best explained on this basis. The difference in § 12 between the rights of illegitimate children in the estates of their fathers and mothers, however, is more convincingly explained by the other factors mentioned by the court below. Accepting in this respect the views of the Illinois Supreme Court, we find in § 12 a primary purpose to provide a system of intestate succession more just to illegitimate children than the prior law, a purpose tempered by a secondary interest in protecting against spurious claims of paternity. In the absence of a more convincing demonstration, we will not hypothesize an additional state purpose that has been ignored by the Illinois Supreme Court.

IV

For the reasons stated above, we conclude that § 12 of the Illinois Probate Act[17] cannot be squared with the command of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, we reverse the judgment of the Illinois Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent. Like the

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[17] The Illinois statute can be distinguished in several respects from the Louisiana statute in *Labine*. The discrimination in *Labine* took a different form, suggesting different legislative objectives. See, *e. g.*, n. 13, *supra*. In its impact on the illegitimate children excluded from their parents' estates, the statute was significantly different. Under Louisiana law, all illegitimate children, "natural" and "bastard," were entitled to support from the estate of the deceased parent. 401 U. S., at 534 n. 2. Despite these differences, it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls.

Supreme Court of Illinois, they find this case constitutionally indistinguishable from *Labine* v. *Vincent*, 401 U. S. 532 (1971). They would, therefore, affirm the judgment.

MR. JUSTICE REHNQUIST, dissenting.

The Fourteenth Amendment's prohibition against "any State . . . deny[ing] to any person . . . the equal protection of the laws" is undoubtedly one of the majestic generalities of the Constitution. If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted that Clause of the Amendment, there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law.

Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. They have instead produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

It is too well known to warrant more than brief mention that the Framers of the Constitution adopted a system of

checks and balances conveniently lumped under the descriptive head of "federalism," whereby all power was originally presumed to reside in the people of the States who adopted the Constitution. The Constitution delegated some authority to the federal executive, some to the federal legislature, some to the federal judiciary, and reserved the remaining authority normally associated with sovereignty to the States and to the people in the States. In reaching the results that it did, the Constitutional Convention in 1787 rejected the idea that members of the federal judiciary should sit on a council of revision and veto laws which it considered unwise; the Convention also rejected a proposal which would have empowered Congress to nullify laws enacted by any of the several States.

Following the Civil War, Congress propounded and the States ratified the so-called "Civil War Amendments"—the Thirteenth, Fourteenth, and Fifteenth Amendments, which, together with post-Civil War legislation, sharply altered the balance of power between the Federal and State Governments. See *Mitchum* v. *Foster*, 407 U. S. 225, 238–242 (1972). But they were not designed to accomplish this purpose in some vague, ill-defined way which was ultimately to be discovered by this Court more than a century after their enactment. Their language contained the mechanisms by which their purpose was to be accomplished. Congress might affirmatively legislate under § 5 of the Fourteenth Amendment to carry out the purposes of that Amendment; and the courts could strike down state laws found directly to violate the dictates of any of the Amendments.

This was strong medicine, and intended to be such. But it cannot be read apart from the original understanding at Philadelphia: The Civil War Amendments did not make this Court into a council of revision, and they did not confer upon this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest.

That much is common ground at least at the conscious level. But in providing the Court with the duty of enforcing such generalities as the Equal Protection Clause, the Framers of the Civil War Amendments placed it in the position of Adam in the Garden of Eden. As members of a tripartite institution of government which is responsible to no constituency, and which is held back only by its own sense of self-restraint, see *United States* v. *Butler*, 297 U. S. 1, 79 (1936) (Stone, J., dissenting), we are constantly subjected to the human temptation to hold that any law containing a number of imperfections denies equal protection simply because those who drafted it could have made it a fairer or a better law. The Court's opinion in the instant case is no better and no worse than the long series of cases in this line, a line which unfortunately proclaims that the Court has indeed succumbed to the temptation implicit in the Amendment.

The Equal Protection Clause is itself a classic paradox, and makes sense only in the context of a recently fought Civil War. It creates a requirement of equal treatment to be applied to the process of legislation—legislation whose very purpose is to draw lines in such a way that different people are treated differently. The problem presented is one of sorting the legislative distinctions which are acceptable from those which involve invidiously unequal treatment.

All constitutional provisions for protection of individuals involve difficult questions of line drawing. But most others have implicit within them an understandable value judgment that certain types of conduct have a favored place and are to be protected to a greater or lesser degree. Obvious examples are free speech, freedom from unreasonable search and seizure, and the right to a fair trial. The remaining judicial task in applying those guarantees is to determine whether, on given facts, the constitutional value judgment embodied in such a provision has been offended in a particular case.

In the case of equality and equal protection, the constitu-

tional principle—the thing to be protected to a greater or lesser degree—is not even identifiable from within the four corners of the Constitution. For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly. But that statement of the rule does little to determine whether or not a question of equality is even involved in a given case. For the crux of the problem is *whether persons are similarly situated* for purposes of the state action in issue. Nothing in the words of the Fourteenth Amendment specifically addresses this question in any way.

The essential problem of the Equal Protection Clause is therefore the one of determining where the courts are to look for guidance in defining "equal" as that word is used in the Fourteenth Amendment. Since the Amendment grew out of the Civil War and the freeing of the slaves, the core prohibition was early held to be aimed at the protection of blacks. See *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). If race was an invalid sorting tool where blacks were concerned, it followed logically that it should not be valid where other races were concerned either. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). A logical, though not inexorable, next step, was the extension of the protection to prohibit classifications resting on national origin. See *Oyama* v. *California*, 332 U. S. 633 (1948).

The presumptive invalidity of all of these classifications has made decisions involving them, for the most part, relatively easy. But when the Court has been required to adjudicate equal protection claims not based on race or national origin, it has faced a much more difficult task. In cases involving alienage, for example, it has concluded that such classifications are "suspect" because, though not necessarily involving race or national origin, they are enough like the latter to warrant similar treatment. See *Graham* v. *Richard-*

son, 403 U. S. 365 (1971); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973); *In re Griffiths*, 413 U. S. 717 (1973). While there may be individual disagreement as to how such classes are to be singled out and as to whether specific classes are sufficiently close to the core area of race and national origin to warrant such treatment, one cannot say that the inquiry is not germane to the meaning of the Clause.

Illegitimacy, which is involved in this case, has never been held by the Court to be a "suspect classification." Nonetheless, in several opinions of the Court, statements are found which suggest that although illegitimates are not members of a "suspect class," laws which treat them differently from those born in wedlock will receive a more far-reaching scrutiny under the Equal Protection Clause than will other laws regulating economic and social conditions. *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73 (1968); *Labine* v. *Vincent*, 401 U. S. 532 (1971); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *New Jersey Welfare Rights Org.* v. *Cahill*, 411 U. S. 619 (1973); *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974). But see *Mathews* v. *Lucas*, 427 U. S. 495 (1976). The Court's opinion today contains language to that effect. *Ante*, at 766–767. In one sense this language is a source of consolation, since it suggests that parts of the Court's analysis used in this case will not be carried over to traditional "rational basis" or "minimum scrutiny" cases. At the same time, though, it is a source of confusion, since the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject.

The appropriate "scrutiny," in the eyes of the Court, appears to involve some analysis of the relation of the "purpose" of the legislature to the "means" by which it chooses to carry out that purpose. The Court's opinion abounds in language of this sort. We are told that "the sufficiency of the justifi-

cations advanced for the remaining discrimination against illegitimate children must be considered in light of this motivating purpose [discussed by the Supreme Court of Illinois]." *Ante*, at 768. The Court comments that while "[t]he Illinois Supreme Court relied in part on the State's purported interest in 'the promotion of [legitimate] family relationships,'" the statute, in the opinion of this Court, "bears only the most attenuated relationship to the asserted goal." *Ibid.* We are further told that "[t]he court below did not address the relation between § 12 and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete." *Ante*, at 769. But large parts of the Court's opinion are devoted to its assessment of whether § 12 of the Illinois Probate Act did or did not "advance" the "purpose" which the Illinois Legislature had in mind when it passed that section. The crowning irony of the opinion is its assertion that "the judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." *Ante*, at 771.

The "difficulty" of the "judicial task" is, I suggest, a self-imposed one, stemming not from the Equal Protection Clause but from the Court's insistence on reading so much into it. I do not see how it can be doubted that the purpose (in the ordinary sense of that word) of the Illinois Legislature in enacting § 12 of the Illinois Probate Act was to make the language contained in that section a part of the Illinois law. I presume even the Court will concede that this purpose was accomplished. It was this particular language which the Illinois Legislature, by the required vote of both of its houses and the signature of the Governor, enacted into law. The use of the word "purpose" in today's opinion actually expands the normal meaning of the word into something more like motive. Indeed, the Court says that the law "must be considered in light of this motivating purpose." *Ante*, at 768. The question of what "motivated" the various individual

legislators to vote for this particular section of the Probate Act, and the Governor of Illinois to sign it, is an extremely complex and difficult one to answer even if it were relevant to the constitutional question:

> "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977) (footnote omitted).

What the Court in this case is apparently trying to ascertain is what the legislature had in mind or was trying to accomplish by enacting § 12. And, of course, this is actually an inquiry into motive: *Why* did the legislature pass this particular law?

If the great difficulties, described in *Arlington Heights*, *supra*, of ascertaining what various individual legislators "had in mind" when they voted to enact § 12 of the Illinois Probate Act are surmounted, this Court then takes it upon itself to inquire into whether the Act in question accomplished the "purpose" which the Court first determines the legislature had in mind. It should be apparent that litigants who wish to succeed in invalidating a law under the Equal Protection Clause must have a certain schizophrenia if they are to be successful in their advocacy: They must first convince this Court that the legislature had a particular purpose in mind in enacting the law, and then convince it that the law was not at all suited to the accomplishment of that purpose.

But a graver defect than this in the Court's analysis is that it also requires a conscious second-guessing of legislative judgment in an area where this Court has no special expertise

whatever. Even assuming that a court has properly accomplished the difficult task of identifying the "purpose" which a statute seeks to serve, it then sits in judgment to consider the so-called "fit" between that "purpose" and the statutory means adopted to achieve it. In most cases, and all but invariably if the Court insists on singling out a unitary "purpose," the "fit" will involve a greater or lesser degree of imperfection. Then the Court asks itself: How much "imperfection" between means and ends is permissible? In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper. What alternatives were reasonably available? What reasons are there for the legislature to accomplish this "purpose" in the way it did? What obstacles stood in the way of other solutions?

The fundamental flaw, to me, in this approach is that there is absolutely nothing to be inferred from the fact that we hold judicial commissions that would enable us to answer any one of these questions better than the legislators to whose initial decision they were committed. Without any antecedent constitutional mandate, we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks.

I would by no means suggest that this case is the first, and I fear it will not be the last, to import this sort of analysis into the Equal Protection Clause. As long ago as *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920), the Court declared that a classification to be valid under the Equal Protection Clause "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." Mr. Justice Pitney wrote the opinion of the Court in that case, and Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. While the quotation in context is

far less objectionable than the just-quoted excerpt, it seems to me that there is little doubt that this case would be decided differently today.

The familiar quotation from *Royster Guano* comes from a time when the Court was giving a broad reading to both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to invalidate legislation in a way which, it is hoped, would not recur today. See, *e. g.*, *Concordia Ins. Co.* v. *Illinois*, 292 U. S. 535 (1934); *Hartford Co.* v. *Harrison*, 301 U. S. 459 (1937). Every law enacted, unless it applies to all persons at all times and in all places, inevitably imposes sanctions upon some and declines to impose the same sanctions on others. But these inevitable concomitants of legislation have little or nothing to do with the Equal Protection Clause of the Fourteenth Amendment, unless they employ means of sorting people which the draftsmen of the Amendment sought to prohibit. I had thought that cases like *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961), in which the Court, speaking through Mr. Chief Justice Warren, said that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," and *McDonald* v. *Board of Election*, 394 U. S. 802, 809 (1969), in which the Court, again speaking through Mr. Chief Justice Warren, said that "[l]egislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them," would have put to rest the expansive notions of judicial review suggested in the above-quoted excerpt from *Royster Guano*.

Here the Illinois Legislature was dealing with a problem of intestate succession of illegitimates from their fathers, which, as the Court concedes, frequently presents difficult problems of proof. The provisions of Illinois Probate Act § 12, as most recently amended, alleviate some of the difficulties which pre-

viously stood in the way of such succession. The fact that the Act in question does not alleviate all of the difficulties, or that it might have gone further than it did, is to me wholly irrelevant under the Equal Protection Clause. The circumstances which justify the distinction between illegitimates and legitimates contained in § 12 are apparent with no great exercise of imagination; they are stated in the opinion of the Court, though they are there rejected as constitutionally insufficient. Since Illinois' distinction is not mindless and patently irrational, I would affirm the judgment of the Supreme Court of Illinois.

Syllabus

FIALLO, A MINOR, BY RODRIGUEZ, ET AL. *v.* BELL, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 75-6297. Argued December 7, 1976—Decided April 26, 1977

Sections 101 (b)(1)(D) and 101 (b)(2) of the Immigration and Nationality Act of 1952, which have the effect of excluding the relationship between an illegitimate child and his natural father (as opposed to his natural mother) from the special preference immigration status accorded by the Act to the "child" or "parent" of a United States citizen or lawful permanent resident, *held* not to be unconstitutional. Pp. 792–800.

(a) This Court's cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," *Shaughnessy* v. *Mezei*, 345 U. S. 206, 210; see also *Kleindienst* v. *Mandel*, 408 U. S. 753; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589, and no factors exist in the instant case warranting a more searching judicial scrutiny than has generally been applied in immigration cases. Pp. 792–796.

(b) In enacting the challenged statutory provisions Congress was specifically concerned with clarifying the previous law so that the illegitimate child in relation to his mother would have the same status as a legitimate child, and the legislative history of those provisions reflects an intentional choice not to provide preferential immigration status by virtue of the relationship between an illegitimate child and his natural father. The distinction is one of many (such as those based on age) drawn by Congress pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions that would otherwise hinder reunification of the family in this country. The decision as to where to draw the line is a policy question within Congress' exclusive province. Pp. 797–798.

(c) Whether Congress' determination that preferential status is not warranted for illegitimate children and their natural fathers results from a perceived absence in most cases of close family ties or a concern with serious problems of proof that usually lurk in paternity determinations, it is not for the courts to probe and test the justifications for the legislative decision. *Kleindienst* v. *Mandel*, *supra*, at 770. Pp. 798–799.

406 F. Supp. 162, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting statement, *post*, p. 816. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 800.

Janet M. Calvo argued the cause for appellants *pro hac vice*. With her on the briefs were *Kalman Finkel*, *John E. Kirklin*, and *Anita Fisher Barrett*.

Harold R. Tyler, Jr., argued the cause for appellees. On the brief were *Solicitor General Bork*, *Assistant Attorney General Thornburgh*, *Kenneth S. Geller*, and *Sidney M. Glazer*.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case brings before us a constitutional challenge to §§ 101 (b)(1)(D) and 101 (b)(2) of the Immigration and Nationality Act of 1952 (Act), 66 Stat. 182, as amended, 8 U. S. C. §§ 1101 (b)(1)(D) and 1101 (b)(2).

I

The Act grants special preference immigration status to aliens who qualify as the "children" or "parents" of United States citizens or lawful permanent residents. Under § 101 (b)(1), a "child" is defined as an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his natural mother.[1]

[1] Section 101 (b)(1), as set forth in 8 U. S. C. § 1101 (b), provides:

"(1) The term 'child' means an unmarried person under twenty-one years of age who is—

"(A) a legitimate child; or

"(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

"(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

"(D) an illegitimate child, by, through whom, or on whose behalf a

The definition does not extend to an illegitimate child seeking preference by virtue of his relationship with his natural father. Moreover, under § 101 (b)(2), a person qualifies as a "parent" for purposes of the Act solely on the basis of the person's relationship with a "child." As a result, the natural father of an illegitimate child who is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a "parent."

The special preference immigration status provided for those who satisfy the statutory "parent-child" relationship depends on whether the immigrant's relative is a United States citizen or permanent resident alien. A United States citizen is allowed the entry of his "parent" or "child" without regard to *either* an applicable numerical quota *or* the labor certification requirement. 8 U. S. C. §§ 1151 (a), (b), 1182 (a)(14). On the other hand, a United States permanent resident alien is allowed the entry of the "parent" or "child" subject to numerical limitations but without regard to the labor certifi-

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status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

"(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

"(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151 (b) of this title [§ 201 (b)], who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That no natural parent or prior adoptive parent of any such

cation requirement. 8 U. S. C. § 1182 (a)(14); see 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.40 n. 18 (rev. ed. 1975).[2]

Appellants are three sets of unwed natural fathers and their illegitimate offspring who sought, either as an alien father or an alien child, a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent. In each instance the applicant was informed that he was ineligible for an immigrant visa unless he qualified for admission under the general numerical limitations and, in the case of the alien parents, received the requisite labor certification.[3]

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child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."

[2] Effective January 1, 1977, the parent-child relationship no longer triggers an exemption from the labor certification requirement. Immigration and Nationality Act Amendments of 1976, § 5, 90 Stat. 2705. The 1976 amendments contain a saving clause, § 9, however, which provides that the amendments

"shall not operate to affect the entitlement to immigrant status or the order of consideration for issuance of an immigrant visa of an alien entitled to a preference status, under section 203 (a) of the Immigration and Nationality Act, as in effect on the day before the effective date of this Act, on the basis of a petition filed with the Attorney General prior to such effective date."

[3] Appellant Ramon Martin Fiallo, a United States citizen by birth, currently resides in the Dominican Republic with his natural father, appellant Ramon Fiallo-Sone, a citizen of that country. The father initiated procedures to obtain an immigrant visa as the "parent" of his illegitimate son, but the United States Consul for the Dominican Republic informed appellant Fiallo-Sone that he could not qualify for the preferential status accorded to "parents" unless he legitimated Ramon Fiallo.

Appellant Cleophus Warner, a naturalized United States citizen, is the unwed father of appellant Serge Warner, who was born in 1960 in the French West Indies. In 1972 Cleophus Warner petitioned the Immigration and Naturalization Service to classify Serge as Warner's "child" for purposes of obtaining an immigrant visa, but the petition was denied on the ground that there was no evidence that Serge was Warner's legitimate or legitimated offspring.

Appellants Trevor Wilson and Earl Wilson, permanent resident aliens,

Appellants filed this action in July 1974 in the United States District Court for the Eastern District of New York challenging the constitutionality of §§ 101 (b)(1) and 101 (b)(2) of the Act under the First, Fifth, and Ninth Amendments. Appellants alleged that the statutory provisions (i) denied them equal protection by discriminating against natural fathers and their illegitimate children "on the basis of the father's marital status, the illegitimacy of the child and the sex of the parent without either compelling or rational justification"; (ii) denied them due process of law to the extent that there was established "an unwarranted conclusive presumption of the absence of strong psychological and economic ties between natural fathers and their children born out of wedlock and not legitimated"; and (iii) "seriously burden[ed] and infringe[d] upon the rights of natural fathers and their children, born out of wedlock and not legitimated, to mutual association, to privacy, to establish a home, to raise natural children and to be raised by the natural father." App. 11–12. Appellants sought to enjoin permanently enforcement of the challenged statutory provisions to the extent that the statute precluded them from qualifying for the special preference accorded other "parents" and "children."

A three-judge District Court was convened to consider the constitutional issues. After noting that Congress' power to fashion rules for the admission of aliens was "exceptionally broad," the District Court held, with one judge dissenting, that the statutory provisions at issue were neither "wholly devoid of any conceivable rational purpose" nor "fundamentally aimed at achieving a goal unrelated to the regulation of immigration." *Fiallo* v. *Levi*, 406 F. Supp. 162, 165, 166

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are the illegitimate children of appellant Arthur Wilson, a citizen of Jamaica. Following the death of their mother in 1974, Trevor and Earl sought to obtain an immigrant visa for their father. We are informed by the appellees that although the application has not yet been rejected, denial is certain since the children are neither legitimate nor legitimated offspring of Arthur Wilson.

(1975). The court therefore granted judgment for the Government and dismissed the action.

We noted probable jurisdiction *sub nom. Fiallo* v. *Levi*, 426 U. S. 919 (1976), and for the reasons set forth below we affirm.

II

At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909); accord, *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972). Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *Mezei*, 345 U. S. 206, 210 (1953); see, *e. g.*, *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952); *Lem Moon Sing* v. *United States*, 158 U. S. 538 (1895); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893); *The Chinese Exclusion Case*, 130 U. S. 581 (1889). Our recent decisions have not departed from this long-established rule. Just last Term, for example, the Court had occasion to note that "the power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 101 n. 21 (1976), citing *Fong Yue Ting* v. *United States*, *supra*, at 713; accord, *Mathews* v. *Diaz*, 426 U. S. 67, 81–82 (1976). And we observed recently that in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.*, at 80.[4]

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[4] Writing for the Court in *Galvan* v. *Press*, 347 U. S. 522 (1954), Mr. Justice Frankfurter noted that "much could be said for the view" that due process places some limitations on congressional power in the immigration area, "were we writing on a clean slate."

"But the slate is not clean. As to the extent of the power of Congress

Appellants apparently do not challenge the need for special judicial deference to congressional policy choices in the immigration context,[5] but instead suggest that a "unique coalescing of factors" makes the instant case sufficiently unlike prior immigration cases to warrant more searching judicial scrutiny. Brief for Appellants 52–55. Appellants first observe that since the statutory provisions were designed to reunite families wherever possible, the purpose of the statute was to afford rights not to aliens but to United States citizens and legal permanent residents. Appellants then rely on our border-search decisions in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), and *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), for the proposition that the courts must

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under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. . . .

"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens . . . ." *Id.*, at 530–532.

We are no more inclined to reconsider this line of cases today than we were five years ago when we decided *Kleindienst* v. *Mandel*, 408 U. S. 753, 767 (1972).

[5] The appellees argue that the challenged sections of the Act, embodying as they do "a substantive policy regulating the admission of aliens into the United States, [are] not an appropriate subject for judicial review." Brief for Appellees 15, 19–24. Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens, and there is no occasion to consider in this case whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.

scrutinize congressional legislation in the immigration area to protect against violations of the rights of citizens. At issue in the border-search cases, however, was the nature of the protections mandated by the Fourth Amendment with respect to Government procedures designed to stem the illegal entry of aliens. Nothing in the opinions in those cases suggests that Congress has anything but exceptionally broad power to determine which classes of aliens may lawfully enter the country. See 413 U. S., at 272; 422 U. S., at 883–884.

Appellants suggest a second distinguishing factor. They argue that none of the prior immigration cases of this Court involved "double-barreled" discrimination based on sex and illegitimacy, infringed upon the due process rights of citizens and legal permanent residents, or implicated "the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship." Brief for Appellants 53–54; see *id.*, at 16–18. But this Court has resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required. In *Kleindienst* v. *Mandel*, *supra*, for example, United States citizens challenged the power of the Attorney General to deny a visa to an alien who, as a proponent of "the economic, international, and governmental doctrines of World communism," was ineligible to receive a visa under 8 U. S. C. § 1182 (a)(28)(D) absent a waiver by the Attorney General. The citizen-appellees in that case conceded that Congress could prohibit entry of all aliens falling into the class defined by § 1182 (a)(28)(D). They contended, however, that the Attorney General's statutory discretion to approve a waiver was limited by the Constitution and that their First Amendment rights were abridged by the denial of Mandel's request for a visa. The Court held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind

the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U. S., at 770. We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst* v. *Mandel*, a First Amendment case.[6]

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[6] The thoughtful dissenting opinion of our Brother MARSHALL would be persuasive if its basic premise were accepted. The dissent is grounded on the assumption that the relevant portions of the Act grant a "fundamental right" to American citizens, a right "given only to the citizen" and not to the putative immigrant. *Post*, at 806, 808, 816. The assumption is facially plausible in that the families of putative immigrants certainly have an interest in their admission. But the fallacy of the assumption is rooted deeply in fundamental principles of sovereignty.

We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners in accordance with perceived national interests. Although few, if any, countries have been as generous as the United States in extending the privilege to immigrate, or in providing sanctuary to the oppressed, limits and classifications as to who shall be admitted are traditional and necessary elements of legislation in this area. It is true that the legislative history of the provision at issue here establishes that congressional concern was directed at "the problem of keeping families of United States citizens and immigrants united." H. R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957). See also H. R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952) (statute implements "the underlying intention of our immigration laws regarding the preservation of the family unit"). To accommodate this goal, Congress has accorded a special "preference status" to certain aliens who share relationships with citizens or permanent resident aliens. But there are widely varying relationships and degrees of kinship, and it is appropriate for Congress to consider not only the nature of these relationships but also problems of identification, administration, and the potential for fraud. In the inevitable process of "line drawing," Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and it has granted preferential status only to those classes.

As Mr. Justice Frankfurter wrote years ago, the formulation of these "[p]olicies pertaining to the entry of aliens . . . is entrusted exclusively to Congress." *Galvan* v. *Press*, 347 U. S., at 531. This is not to say, as

Finally, appellants characterize our prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were "specifically and clearly perceived to pose a grave threat to the national security," citing *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952), "or to the general welfare of this country," citing *Boutilier* v. *INS*, 387 U. S. 118 (1967). Brief for Appellants 54. We find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, "[s]ince decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary," and "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews* v. *Diaz*, 426 U. S., at 81–82. See *Harisiades* v. *Shaughnessy*, *supra*, at 588–589. As Mr. Justice Frankfurter observed in his concurrence in *Harisiades* v. *Shaughnessy*:

> "The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control." 342 U. S., at 596–597.

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we make clear in n. 5, *supra*, that the Government's power in this area is never subject to judicial review. But our cases do make clear that despite the impact of these classifications on the interests of those already within our borders, congressional determinations such as this one are subject only to limited judicial review.

III

As originally enacted in 1952, § 101 (b)(1) of the Act defined a "child" as an unmarried legitimate or legitimated child or stepchild under 21 years of age. The Board of Immigration Appeals and the Attorney General subsequently concluded that the failure of this definition to refer to illegitimate children rendered ineligible for preferential nonquota status both the illegitimate alien child of a citizen mother, *Matter of A*, 5 I. & N. Dec. 272, 283–284 (A. G. 1953), and the alien mother of a citizen born out of wedlock, *Matter of F*, 7 I. & N. Dec. 448 (B. I. A. 1957). The Attorney General recommended that the matter be brought to the attention of Congress, *Matter of A*, *supra*, at 284, and the Act was amended in 1957 to include what is now 8 U. S. C. § 1101 (b)(1)(D). See n. 1, *supra*. Congress was specifically concerned with the relationship between a child born out of wedlock and his or her natural mother, and the legislative history of the 1957 amendment reflects an intentional choice not to provide preferential immigration status by virtue of the relationship between an illegitimate child and his or her natural father.[7]

This distinction is just one of many drawn by Congress pursuant to its determination to provide some—but not all—families with relief from various immigration restrictions that would otherwise hinder reunification of the family in this country. In addition to the distinction at issue here, Con-

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[7] S. Rep. No. 1057, 85th Cong., 1st Sess., 4 (1957) (the amendment was designed "to clarify the law so that the illegitimate child would *in relation to his mother* enjoy the same status under the immigration laws as a legitimate child") (emphasis added); H. R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957) (the amendment was designed "to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock and *the mothers of such children*") (emphasis added); 103 Cong. Rec. 14659 (1957) (remarks of Sen. Kennedy) (the amendment "would clarify the law so that an illegitimate child would, *in relation to his mother*, enjoy the same status under immigration laws as a legitimate child") (emphasis added).

gress has decided that children, whether legitimate or not, cannot qualify for preferential status if they are married or are over 21 years of age. 8 U. S. C. § 1101 (b)(1). Legitimated children are ineligible for preferential status unless their legitimation occurred prior to their 18th birthday and at a time when they were in the legal custody of the legitimating parent or parents. § 1101 (b)(1)(C). Adopted children are not entitled to preferential status unless they were adopted before the age of 14 and have thereafter lived in the custody of their adopting or adopted parents for at least two years, § 1101 (b)(1)(E). And stepchildren cannot qualify unless they were under 18 at the time of the marriage creating the stepchild relationship. § 1101 (b)(1)(B).

With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties. Cf. *Mathews* v. *Diaz*, *supra*, at 83–84. But it is clear from our cases, see Part II, *supra*, that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.

Appellants suggest that the distinction drawn in § 101 (b)(1)(D) is unconstitutional under any standard of review since it infringes upon the constitutional rights of citizens and legal permanent residents without furthering legitimate governmental interests. Appellants note in this regard that the statute makes it more difficult for illegitimate children and their natural fathers to be reunited in this country than for legitimate or legitimated children and their parents, or for illegitimate children and their natural mothers. And appellants also note that the statute fails to establish a procedure under which illegitimate children and their natural fathers could prove the existence and strength of their family relationship. Those are admittedly the consequences of the

congressional decision not to accord preferential status to this particular class of aliens, but the decision nonetheless remains one "solely for the responsibility of the Congress and wholly outside the power of this Court to control." *Harisiades* v. *Shaughnessy*, 342 U. S., at 597 (Frankfurter, J., concurring). Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.[8] See *Trimble* v. *Gordon*, *ante*, at 771. In any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision.[9] *Kleindienst* v. *Mandel*, 408 U. S., at 770.

IV

We hold that §§ 101 (b)(1)(D) and 101 (b)(2) of the

[8] The inherent difficulty of determining the paternity of an illegitimate child is compounded when it depends upon events that may have occurred in foreign countries many years earlier. Congress may well have given substantial weight, in adopting the classification here challenged, to these problems of proof and the potential for fraudulent visa applications that would have resulted from a more generous drawing of the line. Moreover, our cases clearly indicate that legislative distinctions in the immigration area need not be as "'carefully tuned to alternative considerations,'" *Trimble* v. *Gordon*, *ante*, at 772 (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 513 (1976)), as those in the domestic area.

[9] Appellants insist that the statutory distinction is based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children, and that existing administrative procedures, which had been developed to deal with the problems of proving paternity, maternity, and legitimation with respect to statutorily recognized "parents" and "children," could easily handle the problems of proof involved in determining the paternity of an illegitimate child. We simply note that this argument should be addressed to the Congress rather than the courts. Indeed, in that regard it is worth noting that a bill introduced in the 94th Congress would have eliminated the challenged distinction. H. R. 10993, 94th Cong., 1st Sess. (1975).

Immigration and Nationality Act of 1952 are not unconstitutional by virtue of the exclusion of the relationship between an illegitimate child and his natural father from the preferences accorded by the Act to the "child" or "parent" of a United States citizen or lawful permanent resident.

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Until today I thought it clear that when Congress grants benefits to some citizens, but not to others, it is our duty to insure that the decision comports with Fifth Amendment principles of due process and equal protection. Today, however, the Court appears to hold that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws. Since I cannot agree that Congress has license to deny fundamental rights to citizens according to the most disfavored criteria simply because the Immigration and Nationality Act is involved, I dissent.

I

The Immigration and Nationality Act of 1952 (INA), 8 U. S. C. § 1101 *et seq.*, establishes the terms and conditions for entry into the United States. Among its various conditions, the Act requires that an alien seeking to enter the United States as a legal permanent resident must come within a restrictive numerical quota and must satisfy certain labor certification requirements. INA §§ 201, 202, 212 (a)(14), 8 U. S. C. §§ 1151, 1152, 1182 (a)(14) (1976 ed.), as amended by the Immigration and Nationality Act Amendments of 1976, 90 Stat. 2703 (hereinafter 1976 Amendments). In recognition of the fact that such requirements frequently separate families, Congress has provided that American citizens may petition

to have the requirements waived for their immediate families—spouse, parents, children. INA §§ 201 (a), (b), 212 (a)(14), 8 U. S. C. §§ 1151 (a), (b), 1182 (a)(14).[1]

[1] Title 8 U. S. C. §§ 1151 (a) and (b) provide:

"§ 1151. Numerical limitations on total lawful admissions.

"(a) Quarterly and yearly limitations.

"Exclusive of special immigrants defined in section 1101 (a) (27) of this title, and of the immediate relatives of United States citizens specified in subsection (b) of this section, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to section 1153 (a)(7) of this title enter conditionally, (i) shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

"(b) Immediate relatives defined.

"*The 'immediate relatives' referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided,* That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this chapter." (Emphasis added.)

The changes made by the 1976 Amendments were not material to this case.

Title 8 U. S. C. § 1182 (a)(14) provides:

"§ 1182. Excludable aliens.

"(a) General classes.

"Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . .

"(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the

The privilege is accorded only to those parents and children who satisfy the statute's definitions. Under INA § 101 (b) (1), a "child" is defined as an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child by whom or on whose behalf a privilege is sought by virtue of the relationship of the child to its biological mother. 8 U. S. C. § 1101 (b)(1).[2] A "parent" is defined under INA § 101 (b)(2) solely

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employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101 (a) (27) (A) of this title (*other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence*), to preference immigrant aliens described in sections 1153 (a) (3) and 1153 (a) (6) of this title, and to nonpreference immigrant aliens described in section 1153 (a) (8) of this title." (Emphasis added.)

For the significance of the 1976 Amendments on this section, see n. 4, *infra*.

[2] Title 8 U. S. C. § 1101 (b)(1) provides:

"(1) The term *'child'* means an unmarried person under twenty-one years of age who is—

"(A) a legitimate child; or

"(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

"(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

"(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

"(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of

on the basis of the individual's relationship with a "child" as defined by § 101 (b)(1). 8 U. S. C. § 1101 (b)(2).[3] The definitions cover virtually all parent-child relationships except that of biological father-illegitimate child. Thus while all American citizens are entitled to bring in their alien children without regard to either the numerical quota or the labor certification requirement, fathers are denied this privilege with respect to their illegitimate children. Similarly, all citizens are allowed to have their parents enter without regard to the labor certification requirement, and, if the citizen is over 21, also without regard to the quota. Illegitimate children, however, are denied such preferences for their fathers.

The unfortunate consequences of these omissions are graphically illustrated by the case of appellant Cleophus Warner.[4]

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such parentage, be accorded any right, privilege, or status under this chapter.

"(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151 (b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."

[3] Title 8 U. S. C. § 1101 (b)(2) provides:

"The terms 'parent,' 'father,' or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

[4] Instituting this suit with Warner were Ramon Fiallo, and Trevor and Earl Wilson. Both Fiallo, a five-year-old American citizen, and the Wilsons, teen-aged permanent resident aliens, sought the waiver of the labor

Mr. Warner is a naturalized citizen of the United States who, pursuant to 8 U. S. C. § 1154,[5] petitioned the Attorney General for an immigrant visa for his illegitimate son Serge, a citizen of the French West Indies. Despite the fact that Mr. Warner acknowledged his paternity and registered as Serge's father shortly after his birth, has his name on Serge's birth certificate, and has supported and maintained Serge since birth, the special dispensation from the quota and labor certification requirements was denied because Serge was not a "child" under the statute. It matters not that, as the Government concedes, Tr. of Oral Arg. 25–26, Serge's mother has abandoned Serge to his father and has, by marrying another man, apparently rendered impossible, under French West Indies law, Mr. Warner's ever legitimating Serge. Mr. Warner is simply not Serge's "parent."

II

The Government contends that this legislation is not subject to judicial review. Pointing to the fact that aliens have no constitutional right to immigrate to the United States and to a long line of cases that recognize that policies pertaining to

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certification requirements for their respective fathers. Although the 1976 Amendments removed the exemptions from the labor certification requirement for the parent-child relationship, nevertheless their cases are not moot. There is a saving clause providing: "The amendments made by this Act shall not operate to affect the entitlement to immigrant status or the order of consideration for issuance of an immigrant visa of an alien entitled to a preference status, under section 203 (a) of the Immigration and Nationality Act, as in effect on the day before the effective date of this Act, on the basis of a petition filed with the Attorney General prior to such effective date." 1976 Amendments § 9.

Since these situations cannot recur, however, I will focus on Mr. Warner, whose plight, unfortunately, can be repeated.

[5] The citizen seeking "immediate relative" status for his or her spouse, parent, or child must file a so-called Form I–130 petition with the Attorney General. See text accompanying n. 7, *infra*, for a description of the procedure.

the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government, the Government concludes that "[t]he congressional decision whether or to whom to extend such a valuable privilege . . . is not a subject of judicial concern." Brief for Appellees 22.

The Court rightly rejects this expansive claim and recognizes that "[o]ur cases reflect acceptance of a limited judicial responsibility . . . even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Ante*, at 793 n. 5. It points out, however, that the scrutiny is circumscribed. Congress has "broad power to determine which classes of aliens may lawfully enter the country" and its political judgments warrant deference. *Ante*, at 794–796.

I wholeheartedly agree with the Court's rejection of the Government's claim of unreviewable discretion. Indeed, as I observed in *Kleindienst* v. *Mandel*, 408 U. S. 753, 781 (1972) (dissenting opinion), the old immigration cases that reflect an absolute "hands-off" approach by this Court "are not the strongest precedents in the United States Reports." I am pleased to see the Court reveal once again a "reluctance to rely on them completely." *Ibid.* I also have no quarrel with the principle that the essentially political judgments by Congress as to which foreigners may enter and which may not deserve deference from the judiciary.

My disagreement with the Court arises from its application of the principle in this case. The review the majority purports to require turns out to be completely "toothless." Cf. *Trimble* v. *Gordon*, *ante*, at 767. After observing the effects of the denial of preferential status to appellants, the majority concludes: "[B]ut the decision nonetheless remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'" *Ante*, at 799. Such "review" reflects more than due deference; it is abdication.[6]

[6] The majority does not even engage in the modest degree of scrutiny required by *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972). See discussion

Assuming, *arguendo*, that such deference might be appropriate in some situations—a supposition I find difficult to accept—it is particularly inappropriate in this case.

This case, unlike most immigration cases that come before the Court, directly involves the rights of citizens, not aliens. "[C]oncerned with the problem of keeping families of United States citizens and immigrants united," H. R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), Congress extended to American citizens the right to choose to be reunited in the United States with their immediate families. The focus was on citizens and their need for relief from the hardships occasioned by the immigration laws. The right to seek such relief was given only to the citizen, not the alien. 8 U. S. C. § 1154.[7] If the citizen does not petition the Attorney General for the special "immediate relative" status for his parent or child, the alien,

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infra, at 807–808. That failure, I submit, is due to the fact that the statute could not even pass that standard of review. See Part III, *infra*.

[7] Under 8 U. S. C. § 1154 (a), "[a]ny citizen of the United States claiming that an alien is entitled to . . . an immediate relative status under section 1151 (b) of this title . . . *may* file a petition with the Attorney General for such classification." (Emphasis added.) Title 8 U. S. C. § 1154 (b) prescribes the procedure after a petition is filed:

"(b) Investigation; consultation; approval; authorization to grant preference status

"After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153 (a) (3) or 1153 (a) (6) of this title, the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151 (b) of this title, or is eligible for a preference status under section 1153 (a) of this title, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status."

Title 8 U. S. C. § 1153 (d) precludes a consular officer from granting preferential status as an "immediate relative" "until he has been authorized to do so as provided by section 1154."

despite his relationship, can receive no preference. 8 U. S. C. § 1153 (d). It is irrelevant that aliens have no constitutional right to immigrate and that Americans have no constitutional right to compel the admission of their families. The essential fact here is that Congress did choose to extend such privileges to American citizens but then denied them to a small class of citizens. When Congress draws such lines among citizens, the Constitution requires that the decision comport with Fifth Amendment principles of equal protection and due process. The simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgment of citizens' fundamental interests.

The majority responds that in *Kleindienst* v. *Mandel, supra,* the Court recognized that First Amendment rights of citizens were "implicated," but refused to engage in the close scrutiny usually required in First Amendment cases. Therefore, it argues, no more exacting standard is required here. In that case, Mandel, a Belgian "revolutionary Marxist," could visit this country only if the Attorney General waived the statutory prohibition of visas to "[a]liens who advocate the economic, international, and governmental doctrines of World communism." 8 U. S. C. § 1182 (a)(28)(D). The Attorney General denied the waiver, and suit was brought by Mandel and several citizens who claimed their First Amendment right to hear Mandel in person was abridged by the denial. Rejecting the Government's contention that it had "unfettered discretion, and any reason or no reason [for denying a waiver] may be given," the Court upheld the denial only after finding that it was based on a "legitimate and bona fide" reason—Mandel's abuses of visa privileges on a prior visit. 408 U. S., at 769. At the same time, however, the Court chose not to scrutinize more closely and accepted the reason without weighing against it the claimed First Amendment interest. It feared becoming embroiled in the "dangerous and undesirable" task of con-

sidering, every time an alien was denied a waiver, such factors as the projected number of people wishing to speak with the alien and the probity of his ideas. *Id.*, at 769.

Whatever the merits of the Court's fears in *Mandel*, cf. *id.*, at 774 (MARSHALL, J., dissenting), the present case is clearly distinguishable in two essential respects. First, in *Mandel*, Congress had not focused on citizens and their need for relief. Rather, the governmental action was concerned with keeping out "undesirables." The impact on the citizens' right to hear was an incidental and unavoidable consequence of that political judgment. The present case presents a qualitatively different situation. Here, the purpose of the legislation is to accord rights, not to aliens, but to United States citizens. In so doing, Congress deliberately chose, for reasons unrelated to foreign policy concerns or threats to national security, to deny those rights to a class of citizens traditionally subject to discrimination.[8] Second, in *Mandel*, unlike the present case, appellees conceded the ability of Congress to enact legislation broadly prohibiting the entry of all aliens with Mandel's beliefs.[9] Their concern was directed instead to the exercise of the discretion granted the Attorney General to waive the prohibition. In the present case, by contrast, we are asked to engage in the traditional task of reviewing the valid-

[8] Indeed, the majority concedes, *ante*, at 795 n. 6, that if it is true that Congress has granted a right to citizens and not to aliens, my position is "persuasive." It then attempts to show that the premise is inaccurate. The effort, however, is doomed. There is no way to avoid the facts that, as the majority agrees, Congress was concerned with the problem of separating United States citizens from their families and that, as the majority ignores, it specifically gave to citizens the right to seek special dispensation from the immigration restrictions for their immediate families. See discussion *supra*, at 806–807.

[9] The Court noted: "[Appellees] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212 (a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision." 408 U. S., at 767. But see *id.*, at 779 n. 4 (MARSHALL, J., dissenting).

ity of a general Act of Congress challenged as unconstitutional on its face. Totally absent therefore is the specter of involving the courts in second-guessing countless individual determinations by the Attorney General as to the merits of a particular alien's entrance.

III

A

Once it is established that this discrimination among citizens cannot escape traditional constitutional scrutiny simply because it occurs in the context of immigration legislation, the result is virtually foreordained. One can hardly imagine a more vulnerable statute.

The class of citizens denied the special privilege of reunification in this country is defined on the basis of two traditionally disfavored classifications—gender and legitimacy. Fathers cannot obtain preferred status for their illegitimate children; mothers can. Conversely, every child except the illegitimate—legitimate, legitimated, step-, adopted—can obtain preferred status for his or her alien father. The Court has little tolerance for either form of discrimination. We require that gender-based classifications "serve important governmental objectives and . . . be substantially related to achievement of those objectives." *Califano* v. *Webster, ante,* at 317; *Califano* v. *Goldfarb, ante,* at 210–211; *Craig* v. *Boren,* 429 U. S. 190, 197 (1976); see also *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975); *Stanton* v. *Stanton,* 421 U. S. 7 (1975); *Taylor* v. *Louisiana,* 419 U. S. 522 (1975); *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Reed* v. *Reed,* 404 U. S. 71 (1971). We are similarly hostile to legislation excluding illegitimates from governmental beneficence, finding it "illogical and unjust" to deprive a child "simply because its natural father has not married its mother." *Gomez* v. *Perez,* 409 U. S. 535, 538 (1973). See also *Trimble* v. *Gordon, ante,* p. 762; *Jimenez* v. *Weinberger,* 417 U. S. 628 (1974); *Beaty* v. *Weinberger,* 478 F. 2d 300 (CA5 1973), summarily aff'd, 418 U. S. 901 (1974);

New Jersey Welfare Rights Org. v. *Cahill*, 411 U. S. 619 (1973); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Davis* v. *Richardson*, 342 F. Supp. 588 (Conn., 1972), summarily aff'd, 409 U. S. 1069 (1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (Md.), summarily aff'd, 409 U. S. 1069 (1972); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73 (1968); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); cf. *Mathews* v. *Lucas*, 427 U. S. 495 (1976). But see *Labine* v. *Vincent*, 401 U. S. 532 (1971).

But it is not simply the invidious classifications that make the statute so vulnerable to constitutional attack. In addition the statute interferes with the fundamental "freedom of personal choice in matters of marriage and family life." *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); see also *Roe* v. *Wade*, 410 U. S. 133, 152–153 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *id.*, at 495–496 (Goldberg, J., concurring); *id.*, at 502–503 (WHITE, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 542–544, 549–553 (Harlan, J., dissenting). The right to live together as a family belongs to both the child who seeks to bring in his or her father and the father who seeks the entrance of his child.

> "It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised . . .' *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972)." *Weinberger* v. *Wiesenfeld*, *supra*, at 652.

In view of the legislation's denial of this right to these classes, it is clear that, whatever the verbal formula, the Government bears a substantial burden to justify the statute.

B

There is no dispute that the purpose of these special preference provisions is to reunify families separated by the immigration laws. As Congress itself declared "[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended [in these provisions] to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H. R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957). It is also clear that when Congress extended the privilege to cover the illegitimate-child-mother relationship in 1957, it did so to alleviate hardships it found in several cases denying preferential status to illegitimate children and their mothers. *Id.*, at 7–8. Accord, S. Rep. No. 1057, 85th Cong., 1st Sess., 4 (1957).

The legislative history, however, gives no indication of why these privileges were absolutely denied illegitimate children and their fathers.[10] The Government suggests that Congress may have believed that "such persons are unlikely to have maintained a close personal relationship with their offspring." Brief for Appellees 17. If so, Congress' chosen shorthand for "closeness" is obviously overinclusive. No one can dispute that there are legitimate, legitimated, step-, and adoptive parent-child relationships and mother-illegitimate child relationships that are not close and yet are accorded the preferential status. Indeed, the most dramatic illustration of the overinclusiveness is the fact that while Mr. Warner can never be deemed a "parent" of Serge, nevertheless, if he should marry, his wife could qualify as a stepparent, entitled to obtain for Serge the preferential status that Mr. Warner cannot

[10] This absence should alert us to the danger, ever present in legislation denying rights along gender and legitimacy lines, that it was very likely "habit, rather than analysis or actual reflection," *Califano* v. *Goldfarb*, *ante*, at 222 (STEVENS, J., concurring), that led Congress to assume that only mothers are close to their illegitimate children.

obtain. *Andrade* v. *Esperdy*, 270 F. Supp. 516 (SDNY 1967); *Nation* v. *Esperdy*, 239 F. Supp. 531 (SDNY 1965).[11] Similarly, a man who, in an adulterous affair, fathers a child outside his marriage cannot be the "parent" of that child, but his wife may petition as stepparent. *Matter of Stultz*, 15 I. & N. Dec. — (1975).

That the statute is underinclusive is also undisputed. Brief for Appellees 17; Tr. of Oral Arg. 21. Indeed, the Government could not dispute it in view of the close relationships exhibited in appellants' cases, recognized in our previous cases, see, *e. g.*, *Trimble* v. *Gordon*, *ante*, p. 762; *Weber* v. *Aetna Casualty & Surety Co.*, *supra*, at 169; *Stanley* v. *Illinois*, *supra*, and established in numerous studies.[12]

The Government suggests that Congress may have decided to accept the inaccurate classifications of this statute because they considered a case-by-case assessment of closeness and

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[11] The Immigration and Naturalization Service (INS) seeks to add a gloss, in such cases, requiring, in addition to the marriage between the petitioner and the father of the illegitimate, some indicia of a "close family unit." *Matter of Harris*, 15 I. & N. Dec. — (1970). The phrase has not been defined but we know that it includes a situation where the father, stepmother, and child have lived together at some time, *Matter of The*, 11 I. & N. Dec. 449 (1965), and excludes the case where neither father nor stepmother ever lived with or cared for the child. *Matter of Harris*, *supra*; *Matter of Amado and Monteiro*, 13 I. & N. Dec. 179 (1969); *Matter of Soares*, 12 I. & N. Dec. 653 (1968); *Matter of Morris*, 11 I. & N. Dec. 537 (1966). The only court to review this interpretation has rejected the added gloss. The fact of the marriage is sufficient to categorize the wife as "stepmother." *Andrade* v. *Esperdy*, 270 F. Supp. 516 (SDNY 1967).

[12] Chaskel, Changing Patterns of Services for Unmarried Parents, 49 Social Casework 3 (1968); Chaskel, The Unmarried Mother: Is She Different? 46 Child Welfare 65, 72 (1967); Herzog, Some Notes About Unmarried Fathers, 45 Child Welfare 194 (April 1966); Knight, Conferences for Pregnant Unwed Teen-Agers, 65 American Journal of Nursing 123, 126 (1965); Sauber, The Role of the Unmarried Father, 4 Welfare in Review 15, 16 (Nov. 1966); Wessel, A Physician Looks at Services for Unmarried Parents, 49 Social Casework 11 (1968).

paternity not worth the administrative costs. This attempted justification is plainly inadequate. In *Stanley* v. *Illinois*, *supra*, we expressed our low regard for the use of "administrative convenience" as the rationale for interfering with a father's right to care for his illegitimate child.

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 405 U. S., at 656–657.

See also *Glona* v. *American Guarantee & Liability Ins. Co.*, *supra*.

This Court has been equally intolerant of the rationale when it is used to deny rights to the illegitimate child. While we are sensitive to " 'the lurking problems with respect to proof of paternity,' " *Trimble* v. *Gordon*, *ante*, at 771, quoting *Gomez* v. *Perez*, 409 U. S. 535, 538 (1973), we are careful not to allow them to be " 'made into an impenetrable barrier that works to shield otherwise invidious discrimination.' " *Trimble*, *ante*, at 771. We require, at a minimum, that the " 'statute [be] carefully tuned to alternative considerations,' " *ante*, at 772, quoting *Mathews* v. *Lucas*, 427 U. S., at 513, and not exclude all illegitimates simply because some situations involve difficulties of proof. *Ibid.*

Given such hostility to the administrative-convenience argument when invidious classifications and fundamental rights are involved, it is apparent that the rationale is inadequate in the present case. As I observed earlier, since Congress gave no indication that administrative costs were its concern we should scrutinize the hypothesis closely. The likelihood of such a rationale is diminished considerably by the comprehensive and elaborate administrative procedures

already established and employed by the INS in passing on claims of the existence of a parent-child relationship. All petitions are handled on a case-by-case basis with the petitioner bearing the burden of proof. Moreover, the INS is no stranger to cases requiring proof of paternity. When, for example, a citizen stepmother petitions for the entrance of her husband's illegitimate child, she must necessarily prove that her husband is the child's father.[13] Indeed, it is ironic that if Mr. Warner marries and his wife petitions for Serge, her proof will, in fact, be one step more complex than his would be—not only must she prove his paternity, but she must also prove their marriage. Nevertheless, she would be entitled to an opportunity to prove those facts; he is not.

Nor is a fear of involvement with foreign laws and records a persuasive explanation of the omission. In administering the Act with respect to legitimated children, for example, the critical issue is whether the steps undertaken are adequate under local law to render the child legitimate, and the INS has become expert in such matters.[14] I note, in this connec-

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[13] The easiest proof is a birth certificate that names the father. Review of Immigration Problems: Hearings on H. R. 10993 before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary, 94th Cong., 1st and 2d Sess., 150–151, 154 (1975–1976). Alternatively, the INS obtains affidavits from the natural mother or other people familiar with the relationship, looks at school documents which may name the father, and considers facts of custody or support. *Ibid.* The INS also relies on local judicial determinations if they exist, but it does not require them because "alternative administrative recognition procedures . . . normally available to the natural father . . . are less cumbersome and time consuming and are regarded by consular officers as equally reliable with court determinations in eliminating fraudulent claims to the paternal relationship." *Id.*, at 151.

[14] The variations are many. In some countries legitimation may be accomplished only by marriage of the natural parents, *Matter of Blancaflor*, 14 I. & N. Dec. 427 (1973) (Philippines); *Matter of F*, 7 I. & N. Dec. 448 (1957) (Portugal); *Matter of W*, 9 I. & N. Dec. 223 (1961) (Surinam); *Matter of J*, 9 I. & N. Dec. 246 (1961) (British Guiana); *Matter of C*,

tion, that where a child was born in a country in which all children are legitimate,[15] proof of paternity is the critical issue and the proof problems are identical to those involved with an illegitimate child.

Given the existence of these procedures and expertise, it is difficult indeed to give much weight to the hypothesized administrative-convenience rationale. Moreover, as noted previously, this Court will not allow concerns with proof to justify "an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez, supra,* at 538. As the facts of this case conclusively demonstrate, Congress has "failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Trimble, ante,* at 770–771. Mr. Warner is a classic example of someone who can readily prove both paternity and closeness. Appellees concede this. Tr. of Oral Arg. 21–22. The fact that he is denied the opportunity demonstrates beyond peradventure that Congress has failed to "'carefully tun[e] [the statute] to alternative considerations.'" *Trimble, ante,* at 772, quoting *Mathews* v. *Lucas,* 427 U. S., at 513. That failure is fatal to the statute. *Trimble, ante,* at 772–773.[16]

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9 I. & N. Dec. 597 (1962) (Spain); by court decree, *Matter of J and Y,* 3 I. & N. Dec. 657 (1949); *Matter of Duncan,* 15 I. & N. Dec. — (I. D. 2373, 1975) (Liberia); or by formal recognition, *Matter of K,* 8 I. & N. Dec. 73 (1958) (Poland); *Matter of Jancar,* 11 I. & N. Dec. 365 (1965) (Yugoslavia); *Matter of G,* 9 I. & N. Dec. 518 (1961) (Hungary); *Matter of Peters,* 11 I. & N. Dec. 691 (1966) (Virgin Islands); *Matter of Sinclair,* 13 I. & N. Dec. 613 (1970) (Panama); *Matter of Kubicka,* 14 I. & N. Dec. 303 (1972) (Poland); *Matter of Coker,* 14 I. & N. Dec. 521 (1974) (Nigeria); *Matter of Kim,* 14 I. & N. Dec. 561 (1974) (Korea). In some countries a child born out of wedlock is deemed the legitimate child of both parents, *Matter of G, supra;* cf. *Matter of Lo,* 14 I. & N. Dec. 379 (1973) (People's Republic of China).

[15] See, *e. g., Matter of G, supra; Matter of Lo, supra.*

[16] Since resident aliens are also not to be arbitrarily denied privileges on the basis of gender and legitimacy, *Hampton* v. *Mow Sun Wong,*

IV

When Congress grants a fundamental right to all but an invidiously selected class of citizens, and it is abundantly clear that such discrimination would be intolerable in any context but immigration, it is our duty to strike the legislation down. Because the Court condones the invidious discrimination in this case simply because it is embedded in the immigration laws, I must dissent.

MR. JUSTICE WHITE also dissents, substantially for the reasons stated by MR. JUSTICE MARSHALL in his dissenting opinion.

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426 U. S. 88 (1976); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973); *Graham* v. *Richardson*, 403 U. S. 365 (1971), it is clear that appellants Earl and Trevor Wilson, if they meet the terms of the saving clause of the 1976 Amendments, should also be entitled to relief. See n. 5, *supra*.

BOUNDS, CORRECTION COMMISSIONER, ET AL. *v.* SMITH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-915. Argued November 1, 1976—Decided April 27, 1977

The fundamental constitutional right of access to the courts *held* to require prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. *Younger* v. *Gilmore*, 404 U. S. 15. Pp. 821-833.

538 F. 2d 541, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 833. BURGER, C. J., filed a dissenting opinion, *post*, p. 833. STEWART, J., *post*, p. 836, and REHNQUIST, J., *post*, p. 837, filed dissenting opinions, in which BURGER, C. J., joined.

Jacob L. Safron, Special Deputy Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was *Rufus L. Edmisten*, Attorney General.

Barry Nakell, by appointment of the Court, 425 U. S. 968, argued the cause and filed a brief for respondents.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether States must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge. In *Younger* v. *Gilmore*, 404 U. S. 15 (1971), we held *per curiam* that such services are constitutionally mandated. Petitioners, officials of the State of North Carolina, ask us

**Andrew P. Miller*, Attorney General, and *Alan Katz*, Assistant Attorney General, filed a brief for the Commonwealth of Virginia as *amicus curiae* urging reversal.

to overrule that recent case, but for reasons explained below, we decline the invitation and reaffirm our previous decision.

I

Respondents are inmates incarcerated in correctional facilities of the Division of Prisons of the North Carolina Department of Correction. They filed three separate actions under 42 U. S. C. § 1983, all eventually consolidated in the District Court for the Eastern District of North Carolina. Respondents alleged, in pertinent part, that they were denied access to the courts in violation of their Fourteenth Amendment rights by the State's failure to provide legal research facilities.[1]

The District Court granted respondents' motion for summary judgment on this claim,[2] finding that the sole prison library in the State was "severely inadequate" and that there was no other legal assistance available to inmates. It held on the basis of *Younger* v. *Gilmore* that respondents' rights to access to the courts and equal protection of the laws had been violated because there was "no indication of any assistance at the initial stage of preparation of writs and petitions." The court recognized, however, that determining the "appropriate relief to be ordered . . . presents a difficult problem," in view of North Carolina's decentralized prison system.[3] Rather than attempting "to dictate precisely what course the State should follow," the court "charge[d] the Depart-

[1] The complaints also alleged a number of other constitutional violations not relevant to the issue now before us.

[2] The District Court had originally granted summary judgment for the state officials in one of the three consolidated actions. On appeal, the Court of Appeals for the Fourth Circuit appointed counsel and remanded that case with the suggestion that it be consolidated with the other two cases, then still pending in the District Court.

[3] North Carolina's 13,000 inmates are housed in 77 prison units located in 67 counties. Sixty-five of these units hold fewer than 200 inmates. Brief for Petitioners 7 n. 3.

ment of Correction with the task of devising a Constitutionally sound program" to assure inmate access to the courts. It left to the State the choice of what alternative would "most easily and economically" fulfill this duty, suggesting that a program to make available lawyers, law students, or public defenders might serve the purpose at least as well as the provision of law libraries. Supp. App. 12–13.

The State responded by proposing the establishment of seven libraries in institutions located across the State chosen so as to serve best all prison units. In addition, the State planned to set up smaller libraries in the Central Prison segregation unit and the Women's Prison. Under the plan, inmates desiring to use a library would request appointments. They would be given transportation and housing, if necessary, for a full day's library work. In addition to its collection of lawbooks,[4] each library would stock legal forms and writing paper and have typewriters and use of copying machines. The State proposed to train inmates as research assistants and typists to aid fellow prisoners. It was estimated that ultimately some 350 inmates per week could use the libraries, although inmates not facing court deadlines might have to wait three or four weeks for their turn at a library. Respond-

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[4] The State proposed inclusion of the following lawbooks:

North Carolina General Statutes
North Carolina Reports (1960–present)
North Carolina Court of Appeals Reports
Strong's North Carolina Index
North Carolina Rules of Court
United States Code Annotated:
  Title 18
  Title 28 §§ 2241–2254
  Title 28 Rules of Appellate Procedure
  Title 28 Rules of Civil Procedure
  Title 42 §§ 1891–2010
Supreme Court Reporter (1960–present)
Federal 2d Reporter (1960–present)

[*Footnote 4 is continued on page 820*]

ents protested that the plan was totally inadequate and sought establishment of a library at every prison.[5]

The District Court rejected respondents' objections, finding the State's plan "both economically feasible and practicable," and one that, fairly and efficiently run, would "insure each inmate the time to prepare his petitions."[6] *Id.*, at 19. Further briefing was ordered on whether the State was required to provide independent legal advisors for inmates in addition to the library facilities.

In its final decision, the District Court held that petitioners were not constitutionally required to provide legal assistance as well as libraries. It found that the library plan was suf-

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Federal Supplement (1960–present)
Black's Law Dictionary
Sokol: Federal Habeas Corpus
LaFave and Scott: Criminal Law Hornbook (2 copies)
Cohen: Legal Research
Criminal Law Reporter
Palmer: Constitutional Rights of Prisoners

This proposal adheres to a list approved as the minimum collection for prison law libraries by the American Correctional Association (ACA), American Bar Association (ABA), and the American Association of Law Libraries, except for the questionable omission of several treatises, Shepard's Citations, and local rules of court. See ACA, Guidelines for Legal Reference Service in Correctional Institutions: A Tool for Correctional Administrators 5–9 (2d ed. 1975) (hereafter ACA Guidelines); ABA Commission on Correctional Facilities and Services, Bar Association Support to Improve Correctional Services (BASICS), Offender Legal Services 29–30, 70–78 (rev. ed. 1976).

[5] Respondents also contended that the libraries should contain additional legal materials, and they urged creation of a large central circulating library.

[6] The District Court did order two changes in the plan: that extra copies of the U. S. C. A. Habeas Corpus and Civil Rights Act volumes be provided, and that no reporter advance sheets be discarded, so that the libraries would slowly build up duplicate sets. But the court found that most of the prison units were too small to require their own libraries, and that the cost of the additional books proposed by respondents would surpass their usefulness.

ficient to give inmates reasonable access to the courts and that our decision in *Ross* v. *Moffitt*, 417 U. S. 600 (1974), while not directly in point, supported the State's claim that it need not furnish attorneys to bring habeas corpus and civil rights actions for prisoners.

After the District Court approved the library plan, the State submitted an application to the Federal Law Enforcement Assistance Administration (LEAA) for a grant to cover 90% of the cost of setting up the libraries and training a librarian and inmate clerks. The State represented to LEAA that the library project would benefit all inmates in the State by giving them "meaningful and effective access to the court[s]. . . . [T]he ultimate result . . . should be a diminution in the number of groundless petitions and complaints filed . . . . The inmate himself will be able to determine to a greater extent whether or not his rights have been violated" and judicial evaluation of the petitions will be facilitated. Brief for Respondents 3a.

Both sides appealed from those portions of the District Court orders adverse to them. The Court of Appeals for the Fourth Circuit affirmed in all respects save one. It found that the library plan denied women prisoners the same access rights as men to research facilities. Since there was no justification for this discrimination, the Court of Appeals ordered it eliminated. The State petitioned for review and we granted certiorari. 425 U. S. 910 (1976).[7] We affirm.

II

A. It is now established beyond doubt that prisoners have a constitutional right of access to the courts. This Court recognized that right more than 35 years ago when it struck down a regulation prohibiting state prisoners from filing petitions for habeas corpus unless they were found " 'properly

[7] Respondents filed no cross-appeal and do not now question the library plan, nor do petitioners challenge the sex discrimination ruling.

drawn' " by the " 'legal investigator' " for the parole board. *Ex parte Hull*, 312 U. S. 546 (1941). We held this violated the principle that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.*, at 549. See also *Cochran* v. *Kansas*, 316 U. S. 255 (1942).

More recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful. Thus, in order to prevent "effectively foreclosed access," indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees. *Burns* v. *Ohio*, 360 U. S. 252, 257 (1959); *Smith* v. *Bennett*, 365 U. S. 708 (1961). Because we recognized that "adequate and effective appellate review" is impossible without a trial transcript or adequate substitute, we held that States must provide trial records to inmates unable to buy them. *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956).[8] Similarly, counsel must be ap-

[8] See also *Eskridge* v. *Washington Prison Bd.*, 357 U. S. 214 (1958) (provision of trial transcript may not be conditioned on approval of judge); *Draper* v. *Washington*, 372 U. S. 487 (1963) (same); *Lane* v. *Brown*, 372 U. S. 477 (1963) (public defender's approval may not be required to obtain *coram nobis* transcript); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966) (unconstitutional to require reimbursement for cost of trial transcript only from unsuccessful imprisoned defendants); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966) (State must provide transcript of post-conviction proceeding); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967) (State must provide preliminary hearing transcript); *Gardner* v. *California*, 393 U. S. 367 (1969) (State must provide habeas corpus transcript); *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969) (State must provide transcript of petty-offense trial); *Mayer* v. *Chicago*, 404 U. S. 189 (1971) (State must provide transcript of nonfelony trial).

The only cases that have rejected indigent defendants' claims to transcripts have done so either because an adequate alternative was available but not used, *Britt* v. *North Carolina*, 404 U. S. 226 (1971), or because the request was plainly frivolous and a prior opportunity to obtain a transcript was waived, *United States* v. *MacCollom*, 426 U. S. 317 (1976).

pointed to give indigent inmates "a meaningful appeal" from their convictions. *Douglas* v. *California*, 372 U. S. 353, 358 (1963).

Essentially the same standards of access were applied in *Johnson* v. *Avery*, 393 U. S. 483 (1969), which struck down a regulation prohibiting prisoners from assisting each other with habeas corpus applications and other legal matters. Since inmates had no alternative form of legal assistance available to them, we reasoned that this ban on jailhouse lawyers effectively prevented prisoners who were "unable themselves, with reasonable adequacy, to prepare their petitions," from challenging the legality of their confinements. *Id.*, at 489. *Johnson* was unanimously extended to cover assistance in civil rights actions in *Wolff* v. *McDonnell*, 418 U. S. 539, 577–580 (1974). And even as it rejected a claim that indigent defendants have a constitutional right to appointed counsel for discretionary appeals, the Court reaffirmed that States must "assure the indigent defendant an adequate opportunity to present his claims fairly." *Ross* v. *Moffitt*, 417 U. S., at 616. "[M]eaningful access" to the courts is the touchstone. See *id.*, at 611, 612, 615.[9]

Petitioners contend, however, that this constitutional duty merely obliges States to allow inmate "writ writers" to function. They argue that under *Johnson* v. *Avery*, *supra*, as long as inmate communications on legal problems are not restricted, there is no further obligation to expend state funds to implement affirmatively the right of access. This argument misreads the cases.

In *Johnson* and *Wolff* v. *McDonnell*, *supra*, the issue was whether the access rights of ignorant and illiterate inmates were violated without adequate justification. Since these inmates were unable to present their own claims in writing to the courts, we held that their "constitutional right to help,"

[9] The same standards were applied in *United States* v. *MacCollom*, *supra*.

Johnson v. *Avery*, *supra*, at 502 (WHITE, J., dissenting), required at least allowing assistance from their literate fellows. But in so holding, we did not attempt to set forth the full breadth of the right of access. In *McDonnell*, for example, there was already an adequate law library in the prison.[10] The case was thus decided against a backdrop of availability of legal information to those inmates capable of using it. And in *Johnson*, although the petitioner originally requested lawbooks, see 393 U. S., at 484, the Court did not reach the question, as it invalidated the regulation because of its effect on illiterate inmates. Neither case considered the question we face today and neither is inconsistent with requiring additional measures to assure meaningful access to inmates able to present their own cases.[11]

Moreover, our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to

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[10] The plaintiffs stipulated in the District Court to the general adequacy of the library, see *McDonnell* v. *Wolff*, 342 F. Supp. 616, 618, 629–630 (Neb. 1972), although they contested certain limitations on its use. Those claims were resolved by the lower courts. See *id.*, at 619–622; 483 F. 2d 1059, 1066 (CA8 1973); 418 U. S., at 543 n. 2.

[11] Indeed, our decision is supported by the holding in *Procunier* v. *Martinez*, 416 U. S. 396 (1974), in a related right-of-access context. There the Court invalidated a California regulation barring law students and paraprofessionals employed by lawyers representing prisoners from seeing inmate clients. *Id.*, at 419–422. We did so even though California has prison law libraries and permits inmate legal assistance, *Gilmore* v. *Lynch*, 319 F. Supp. 105, 107 n. 1 (ND Cal. 1970), aff'd *sub nom.* *Younger* v. *Gilmore*, 404 U. S. 15 (1971). Even more significantly, the prisoners in question were actually represented by lawyers. Thus, despite the challenged regulation, the inmates were receiving more legal assistance than prisoners aided only by writ writers. Nevertheless, we found that the regulation "impermissibly burdened the right of access." 416 U. S., at 421.

authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), and in appeals as of right, *Douglas* v. *California*, *supra*.[12] This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims. The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.

B. Although it is essentially true, as petitioners argue,[13] that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action, but see, Fed. Rules Civ. Proc. 8 (a)(1), (3), it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

If a lawyer must perform such preliminary research, it is

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[12] Cf. *Estelle* v. *Gamble*, 429 U. S. 97 (1976), holding that States must treat prisoners' serious medical needs, a constitutional duty obviously requiring outlays for personnel and facilities.

[13] Brief for Petitioners 16–17; Tr. of Oral Arg. 3–9, 11–12.

no less vital for a *pro se* prisoner.[14] Indeed, despite the "less stringent standards" by which a *pro se* pleading is judged, *Haines* v. *Kerner*, 404 U. S. 519, 520 (1972), it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case if it is deemed frivolous. See 28 U. S. C. § 1915.[15] Moreover, if the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation. Cf. *Gardner* v. *California*, 393 U. S. 367, 369–370 (1969). In fact, one of the consolidated cases here was initially dismissed by the same judge who later ruled for respondents, possibly because *Younger* v. *Gilmore* was not cited.

We reject the State's claim that inmates are "ill-equipped to use" "the tools of the trade of the legal profession," making libraries useless in assuring meaningful access. Brief for Petitioners 17. In the first place, the claim is inconsistent with the State's representations on its LEAA grant application, *supra*, at 821, and with its argument that access is adequately protected by allowing inmates to help each other with legal problems. More importantly, this Court's experience indicates that *pro se* petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate even

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[14] A source of current legal information would be particularly important so that prisoners could learn whether they have claims at all, as where new court decisions might apply retroactively to invalidate convictions.

[15] The propriety of these practices is not before us. Courts may also impose additional burdens before appointing counsel for indigents in civil suits. See *Johnson* v. *Avery*, 393 U. S. 483, 487–488 (1969).

if ultimately unsuccessful. Finally, we note that if petitioners had any doubts about the efficacy of libraries, the District Court's initial decision left them free to choose another means of assuring access.

It is also argued that libraries or other forms of legal assistance are unnecessary to assure meaningful access in light of the Court's decision in *Ross* v. *Moffitt*. That case held that the right of prisoners to "an adequate opportunity to present [their] claims fairly," 417 U. S., at 616, did not require appointment of counsel to file petitions for discretionary review in state courts or in this Court. *Moffitt*'s rationale, however, supports the result we reach here. The decision in *Moffitt* noted that a court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below. Rather, review is generally granted only if a case raises an issue of significant public interest or jurisprudential importance or conflicts with controlling precedent. *Id.*, at 615–617. *Moffitt* held that *pro se* applicants can present their claims adequately for appellate courts to decide whether these criteria are met because they have already had counsel for their initial appeals as of right. They are thus likely to have appellate briefs previously written on their behalf, trial transcripts, and often intermediate appellate court opinions to use in preparing petitions for further review. *Id.*, at 615.

By contrast in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights. *Johnson* v. *Avery*, 393 U. S., at 485; *Wolff* v. *McDonnell*, 418 U. S., at 579. While applications for

discretionary review need only apprise an appellate court of a case's possible relevance to the development of the law, the prisoner petitions here are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review.[16]

We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.[17]

C. Our holding today is, of course, a reaffirmation of the result reached in *Younger* v. *Gilmore*. While *Gilmore* is not

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[16] Nor is *United States* v. *MacCollom*, 426 U. S. 317 (1976), inconsistent with our decision. That case held that in a post-conviction proceeding under 28 U. S. C. § 2255, an applicant was not unconstitutionally deprived of access to the courts by denial of a transcript of his original trial pursuant to 28 U. S. C. § 753 (f), where he had failed to take a direct appeal and thereby secure the transcript, where his newly asserted claim of error was frivolous, and where he demonstrated no need for the transcript. Without a library or legal assistance, however, inmates will not have "a *current* opportunity to present [their] claims fairly," 426 U. S., at 329 (BLACKMUN, J., concurring in judgment), and valid claims will undoubtedly be lost.

[17] Since our main concern here is "protecting the ability of an inmate to prepare a petition or complaint," *Wolff* v. *McDonnell*, 418 U. S., at 576, it is irrelevant that North Carolina authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts. See N. C. Gen. Stat. § 7A–451 (Supp. 1975); Brief for Petitioners 3 n. 1, 12 n. 8, 14 n. 9, and accompanying text; but cf. *Ross* v. *Moffitt*, 417 U. S. 600, 614 (1974). Moreover, this statute does not cover appointment of counsel in federal habeas corpus or state or federal civil rights actions, all of which are encompassed by the right of access.

Similarly, the State's creation of an advisory Inmate Grievance Commission, see N. C. Gen. Stat. § 148–101 *et seq.* (Supp. 1975); Brief for Petitioners 14, while certainly a noteworthy innovation, does not answer the constitutional requirement for legal assistance to prisoners.

a necessary element in the preceding analysis, its precedential weight strongly reinforces our decision. The substantive question presented in *Gilmore* was: "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?" Jurisdictional Statement 5, Brief for Appellants 4, in No. 70–9, O. T. 1971. This Court explicitly decided that question when it affirmed the judgment of the District Court in reliance on *Johnson* v. *Avery*. Cf. this Court's Rule 15 (c). The affirmative answer was given unanimously after full briefing and oral argument. *Gilmore* has been relied upon without question in our subsequent decisions. *Cruz* v. *Hauck*, 404 U. S. 59 (1971) (vacating and remanding for reconsideration in light of *Gilmore* a decision that legal materials need not be furnished to county jail inmates); *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972) (*Gilmore* cited approvingly in support of inmates' right of access to the courts); *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 34 n. 22 (1973) (*Gilmore* cited approvingly as a decision "removing roadblocks and disincentives to appeal"). Most recently, in *Wolff* v. *McDonnell*, despite differences over other issues in the case, the Court unanimously reaffirmed that *Gilmore* requires prison officials "to provide indigent inmates with access to a reasonably adequate law library for preparation of legal actions." 418 U. S., at 578–579.

Experience under the *Gilmore* decision suggests no reason to depart from it. Most States and the Federal Government have made impressive efforts to fulfill *Gilmore*'s mandate by establishing law libraries, prison legal-assistance programs, or combinations of both. See Brief for Respondents, Ex. B. Correctional administrators have supported the programs and acknowledged their value.[18] Resources and support including

[18] Nearly 95% of the state corrections commissioners, prison wardens, and treatment directors responding to a national survey supported crea-

substantial funding from LEAA have come from many national organizations.[19]

It should be noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here, as in *Gilmore*, does not foreclose alternative means to achieve that goal. Nearly

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tion and expansion of prison legal services. Cardarelli & Finkelstein, Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States, 65 J. Crim. L., C. & P. S. 91, 99 (1974). Almost 85% believed that the programs would not adversely affect discipline or security or increase hostility toward the institution. Rather, over 80% felt legal services provide a safety valve for inmate grievances, reduce inmate power structures and tensions from unresolved legal problems, and contribute to rehabilitation by providing a positive experience with the legal system. *Id.*, at 95–98. See also ACA Guidelines, *supra*, n. 4; National Sheriffs' Assn., Inmates' Legal Rights, Standard 14, pp. 33–34 (1974); Bluth, Legal Services for Inmates: Coopting the Jailhouse Lawyer, 1 Capital U. L. Rev. 59, 61, 67 (1972); Sigler, A New Partnership in Corrections, 52 Neb. L. Rev. 35, 38 (1972).

[19] See, *e. g.*, U. S. Dept. of Justice, LEAA, A Compendium of Selected Criminal Justice Projects, III–201, IV–361–366 (1975); U. S. Dept. of Justice, LEAA, Grant 75 DF–99–0013, Consortium of States to Furnish Legal Counsel to Prisoners, Final Report, and Program Narrative (1975). The ABA BASICS program, see n. 4, *supra*, makes grants to state and local bar associations for prison legal services and libraries and publishes a complete technical assistance manual, Offender Legal Services (rev. ed. 1976). See also ABA Resource Center on Correctional Law and Legal Services, Providing Legal Services to Prisoners, 8 Ga. L. Rev. 363 (1974). The American Correctional Association publishes Guidelines for Legal Reference Service in Correctional Institutions (2d ed. 1975). The American Association of Law Libraries publishes O. Werner, Manual for Prison Law Libraries (1976), and its members offer assistance to prison law library personnel.

See also ABA Joint Committee on the Legal Status of Prisoners, Standards Relating to the Legal Status of Prisoners, Standards 2.1, 2.2, 2.3 and Commentary, 14 Am. Crim. L. Rev. 377, 420–443 (tent. draft 1977); National Conference of Commissioners on Uniform State Laws, Uniform Corrections Code, § 2–601 (tent. draft 1976); National Advisory Commission on Criminal Justice Standards and Goals, Corrections 26–30, Standards 2.2, 2.3 (1973).

half the States and the District of Columbia provide some degree of professional or quasi-professional legal assistance to prisoners. Brief for Respondents, Ex. B. Such programs take many imaginative forms and may have a number of advantages over libraries alone. Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices.[20] Legal services plans not only result in more efficient and skillful handling of prisoner cases, but also avoid the disciplinary problems associated with writ writers, see *Johnson* v. *Avery*, 393 U. S., at 488; *Procunier* v. *Martinez*, 416 U. S. 396, 421–422 (1974). Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly.[21] It has

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[20] For example, full-time staff attorneys assisted by law students and a national back-up center were used by the Consortium of States to Furnish Legal Counsel to Prisoners, see n. 19, *supra*. State and local bar associations have established a number of legal services and library programs with support from the ABA BASICS program, see nn. 4 and 19, *supra*. Prisoners' Legal Services of New York plans to use 45 lawyers and legal assistants in seven offices to give comprehensive legal services to all state inmates. Offender Legal Services, *supra*, n. 19, at iv. Other programs are described in Providing Legal Services to Prisoners, *supra*, n. 19, at 399–416.

[21] See Cardarelli & Finkelstein, *supra*, n. 18, at 96–99; LEAA Consortium Reports, *supra*, n. 19; Champagne & Haas, The Impact of Johnson v. Avery on Prison Administration, 43 Tenn. L. Rev. 275, 295–

been estimated that as few as 500 full-time lawyers would be needed to serve the legal needs of the entire national prison population.[22] Nevertheless, a legal access program need not include any particular element we have discussed, and we encourage local experimentation. Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.[23]

III

Finally, petitioners urge us to reverse the decision below because federal courts should not "sit as co-administrators of state prisons," Brief for Petitioners 13, and because the District Court "exceeded its powers when it puts [*sic*] itself in the place of the [prison] administrators," *id.*, at 14. While we have recognized that judicial restraint is often appropriate in prisoners' rights cases, we have also repeatedly held that this policy "cannot encompass any failure to take cognizance of valid constitutional claims." *Procunier* v. *Martinez*, *supra*, at 405.

Petitioners' hyperbolic claim is particularly inappropriate in this case, for the courts below scrupulously respected the limits on their role. The District Court initially held only that petitioners had violated the "fundamental constitutional guarantee," *ibid.*, of access to the courts. It did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation, strongly suggesting that it would prefer a plan

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299 (1976). Cf. 42 U. S. C. § 2996 (4) (1970 ed., Supp. V), in which Congress, establishing the Legal Services Corp., declared that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws."

[22] ABA Joint Committee, *supra*, n. 19, at 428–429.

[23] See, *e. g.*, *Stevenson* v. *Reed*, 530 F. 2d 1207 (CA5 1976), aff'g 391 F. Supp. 1375 (ND Miss. 1975); *Bryan* v. *Werner*, 516 F. 2d 233 (CA3 1975); *Gaglie* v. *Ulibarri*, 507 F. 2d 721 (CA9 1974); *Corpus* v. *Estelle*, 409 F. Supp. 1090 (SD Tex. 1975).

providing trained legal advisors. Petitioners chose to establish law libraries, however, and their plan was approved with only minimal changes over the strong objections of respondents. Prison administrators thus exercised wide discretion within the bounds of constitutional requirements in this case.

The judgment is

Affirmed.

MR. JUSTICE POWELL, concurring.

The decision today recognizes that a prison inmate has a constitutional right of access to the courts to assert such procedural and substantive rights as may be available to him under state and federal law. It does not purport to pass on the kinds of claims that the Constitution requires state or federal courts to hear. In *Wolff* v. *McDonnell*, 418 U. S. 539, 577–580 (1974), where we extended the right of access recognized in *Johnson* v. *Avery*, 393 U. S. 483 (1969), to civil rights actions arising under the Civil Rights Act of 1871, we did not suggest that the Constitution required such actions to be heard in federal court. And in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), where the Court required the States to provide trial records for indigents on appeal, the plurality and concurring opinions explicitly recognized that the Constitution does not require any appellate review of state convictions. Similarly, the holding here implies nothing as to the constitutionally required scope of review of prisoners' claims in state or federal court.

With this understanding, I join the opinion of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

I am in general agreement with MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, and join in their opinions. I write only to emphasize the theoretical and practical difficulties raised by the Court's holding. The Court leaves us unenlightened as to the source of the "right of access to the courts"

which it perceives or of the requirement that States "foot the bill" for assuring such access for prisoners who want to act as legal researchers and brief writers. The holding, in my view, has far-reaching implications which I doubt have been fully analyzed or their consequences adequately assessed.

It should be noted, first, that the access to the courts which these respondents are seeking is not for the purpose of direct appellate review of their criminal convictions. Abundant access for such purposes has been guaranteed by our prior decisions, *e. g., Douglas* v. *California,* 372 U. S. 353 (1963), and *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and by the States independently. Rather, the underlying substantive right here is that of prisoners to mount collateral attacks on their state convictions. The Court is ordering the State to expend resources in support of the federally created right of collateral review.

This would be understandable if the federal right in question were constitutional in nature. For example, the State may be required by the Eighth Amendment to provide its inmates with food, shelter, and medical care, see *Estelle* v. *Gamble,* 429 U. S. 97, 103–104 (1976); similarly, an indigent defendant's right under the Sixth Amendment places upon the State the affirmative duty to provide him with counsel for trials which may result in deprivation of his liberty, *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972); finally, constitutional principles of due process and equal protection form the basis for the requirement that States expend resources in support of a convicted defendant's right to appeal. See *Douglas* v. *California, supra; Griffin* v. *Illinois, supra.*

However, where the federal right in question is of a statutory rather than a constitutional nature, the duty of the State is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights. *E. g., Ex parte Hull,* 312 U. S. 546 (1941) (State may not interfere with prisoner's access to the federal court by screen-

ing petitions directed to the court); *Johnson* v. *Avery*, 393 U. S. 483 (1969) (State may not prohibit prisoners from providing to each other assistance in preparing petitions directed to the federal courts). Prohibiting the State from interfering with federal statutory rights is, however, materially different from requiring it to provide affirmative assistance for their exercise.

It is a novel and doubtful proposition, in my view, that the Federal Government can, by statute, give individuals certain rights and then require the State, as a *constitutional* matter, to fund the means for exercise of those rights. Cf. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976).

As to the substantive right of state prisoners to collaterally attack in federal court their convictions entered by a state court of competent jurisdiction, it is now clear that there is no broad federal *constitutional* right to such collateral attack, see *Stone* v. *Powell*, 428 U. S. 465 (1976); whatever right exists is solely a creation of federal statute, see *Swain* v. *Pressley*, *ante*, p. 384 (opinion of BURGER, C. J.); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250, 252–256 (1973) (POWELL, J., concurring). But absent a federal constitutional right to attack convictions collaterally—and I discern no such right—I can find no basis on which a federal court may require States to fund costly law libraries for prison inmates.* Proper federal-state relations preclude such intervention in the "complex and intractable" problems of prison administration. *Procunier* v. *Martinez*, 416 U. S. 396 (1974).

I can draw only one of two conclusions from the Court's holding: it may be read as implying that the right of prisoners to collaterally attack their convictions is constitutional, rather than statutory, in nature; alternatively, it may be read as

*The record reflects that prison officials in no way interfered with inmates' use of their own resources in filing collateral attacks. Prison regulations permit access to inmate "writ writers" and each prisoner is entitled to store reasonable numbers of lawbooks in his cell.

holding that States can be compelled by federal courts to subsidize the exercise of federally created statutory rights. Neither of these novel propositions is sustainable and for the reasons stated I cannot adhere to either view and therefore dissent.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, dissenting.

In view of the importance of the writ of habeas corpus in our constitutional scheme, " 'it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.' " *Wolff* v. *McDonnell*, 418 U. S. 539, 578, quoting *Johnson* v. *Avery*, 393 U. S. 483, 485. From this basic principle the Court over five years ago made a quantum jump to the conclusion that a State has a constitutional obligation to provide law libraries for prisoners in its custody. *Younger* v. *Gilmore*, 404 U. S. 15.

Today the Court seeks to bridge the gap in analysis that made *Gilmore*'s authority questionable. Despite the Court's valiant efforts, I find its reasoning unpersuasive.

If, as the Court says, there is a constitutional duty upon a State to provide its prisoners with "meaningful access" to the federal courts, that duty is not effectuated by adhering to the unexplained judgment in the *Gilmore* case. More than 20 years of experience with *pro se* habeas corpus petitions as a Member of this Court and as a Circuit Judge have convinced me that "meaningful access" to the federal courts can seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use. In the vast majority of cases, access to a law library will, I am convinced, simply result in the filing of pleadings heavily larded with irrelevant legalisms—possessing the veneer but lacking the substance of professional competence.

If, on the other hand, MR. JUSTICE REHNQUIST is correct in his belief that a convict in a state prison pursuant to a

final judgment of a court of competent jurisdiction has no constitutional right of "meaningful access" to the federal courts in order to attack his sentence, then a State can be under no constitutional duty to make that access "meaningful." If the extent of the constitutional duty of a State is simply not to deny or obstruct a prisoner's access to the courts, *Johnson* v. *Avery, supra,* then it cannot have, even arguably, any affirmative constitutional obligation to provide law libraries for its prison inmates.

I respectfully dissent.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion in this case serves the unusual purpose of supplying as good a line of reasoning as is available to support a two-paragraph *per curiam* opinion almost six years ago in *Younger* v. *Gilmore,* 404 U. S. 15 (1971), which made no pretense of containing any reasoning at all. The Court's reasoning today appears to be that we have long held that prisoners have a "right of access" to the courts in order to file petitions for habeas corpus, and that subsequent decisions have expanded this concept into what the Court today describes as a "meaningful right of access." So, we are told, the right of a convicted prisoner to "meaningful access" extends to requiring the State to furnish such prisoners law libraries to aid them in piecing together complaints to be filed in the courts. This analysis places questions of prisoner access on a "slippery slope," and I would reject it because I believe that the early cases upon which the Court relies have a totally different rationale from that which underlies the present holding.

There is nothing in the United States Constitution which requires that a convict serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a "right of access" to the federal courts in order to attack his sentence. In the first

case upon which the Court's opinion relies, *Ex parte Hull*, 312 U. S. 546 (1941), the Court held invalid a regulation of the Michigan State prison which provided that " '[a]ll legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals' " which prisoners wish to file in court had to be first submitted to the legal investigator of the state parole board. If the documents were, in the opinion of this official, " 'properly drawn,' " they would be directed to the court designated. Hull was advised that his petition addressed to this Court had been "intercepted" and referred to the legal investigator for the reason that it was "deemed to be inadequate." This Court held that such a regulation was invalid, and said very clearly why:

> "Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.*, at 549.

A number of succeeding cases have expanded on this bare-bones holding that an incarcerated prisoner has a right of physical access to a federal court in order to petition that court for relief which Congress has authorized it to grant. These cases, most of which are mentioned in the Court's opinion, begin with *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and culminate in *United States* v. *MacCollom*, 426 U. S. 317 (1976), decided last Term. Some, such as *Griffin*, *supra*, and *Douglas* v. *California*, 372 U. S. 353 (1963), appear to depend upon the principle that indigent convicts must be given a meaningful opportunity to pursue a state-created right to appeal, even though the pursuit of such a remedy requires that the State must provide a transcript or furnish counsel. Others, such as *Johnson* v. *Avery*, 393 U. S. 483 (1969), *Procunier* v. *Martinez*, 416 U. S. 396 (1974), and *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), depend on the principle that the State, having already incarcerated the convict and thereby virtually eliminated his contact with people outside the prison walls,

may not further limit contacts which would otherwise be permitted simply because such contacts would aid the incarcerated prisoner in preparation of a petition seeking judicial relief from the conditions or terms of his confinement. Clearly neither of these principles supports the Court's present holding: The prisoners here in question have all pursued all avenues of direct appeal available to them from their judgments of conviction, and North Carolina imposes no invidious regulations which allow visits from all persons except those knowledgeable in the law. All North Carolina has done in this case is to decline to expend public funds to make available law libraries to those who are incarcerated within its penitentiaries.

If respondents' constitutional arguments were grounded on the Equal Protection Clause, and were in effect that rich prisoners could employ attorneys who could in turn consult law libraries and prepare petitions for habeas corpus, whereas indigent prisoners could not, they would have superficial appeal. See *Griffin, supra; Douglas, supra.* I believe that they would nonetheless fail under *Ross* v. *Moffitt,* 417 U. S. 600 (1974). There we held that although our earlier cases had required the State to provide meaningful access to state-created judicial remedies for indigents, the only right on direct appeal was that "indigents have an adequate opportunity to present their claims fairly within the adversary system." *Id.,* at 612.

In any event, the Court's opinion today does not appear to proceed upon the guarantee of equal protection of the laws, a guarantee which at least has the merit of being found in the Fourteenth Amendment to the Constitution. It proceeds instead to enunciate a "fundamental constitutional right of access to the courts," *ante,* at 828, which is found nowhere in the Constitution. But if a prisoner incarcerated pursuant to a final judgment of conviction is not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts

to grant, he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way. *Ex parte Hull, supra.* Respondents here make no additional claims that prison regulations invidiously deny them access to those with knowledge of the law so that such regulations would be inconsistent with *Johnson, supra, Procunier, supra,* and *Wolff, supra.* Since none of these reasons is present here, the "fundamental constitutional right of access to the courts" which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived.

Our decisions have recognized on more than one occasion that lawful imprisonment properly results in a "retraction [of rights] justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U. S. 266, 285 (1948); *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974). A convicted prisoner who has exhausted his avenues of direct appeal is no longer to be accorded every presumption of innocence, and his former constitutional liberties may be substantially restricted by the exigencies of the incarceration in which he has been placed. See *Meachum* v. *Fano,* 427 U. S. 215 (1976). Where we come to the point where the prisoner is seeking to collaterally attack a final judgment of conviction, the right of physical access to the federal courts is essential because of the congressional provisions for federal habeas review of state convictions. *Ex parte Hull, supra.* And the furnishing of a transcript to an indigent who makes a showing of probable cause, in order that he may have any realistic chance of asserting his right to such review, was upheld in *United States* v. *MacCollom, supra.* We held in *Ross* v. *Moffitt, supra,* that the *Douglas* holding of a right to counsel on a first direct appeal as of right would not be extended to a discretionary second appeal from an intermediate state appellate court to the state court of last resort, or from the state court of last resort to this Court. It would seem, *a fortiori,* to follow from that case that an

incarcerated prisoner who has pursued all his avenues of direct review would have no constitutional right whatever to state appointed counsel to represent him in a collateral attack on his conviction, and none of our cases has ever suggested that a prisoner would have such a right. See *Johnson* v. *Avery*, 393 U. S., at 488. Yet this is the logical destination of the Court's reasoning today. If "meaningful access" to the courts is to include law libraries, there is no convincing reason why it should not also include lawyers appointed at the expense of the State. Just as a library may assist some inmates in filing papers which contain more than the bare factual allegations of injustice, appointment of counsel would assure that the legal arguments advanced are made with some degree of sophistication.

I do not believe anything in the Constitution requires this result, although state and federal penal institutions might as a matter of policy think it wise to implement such a program. I conclude by indicating the same respect for *Younger* v. *Gilmore*, 404 U. S. 15 (1971), as has the Court, in relegating it to a final section set apart from the body of the Court's reasoning. *Younger* supports the result reached by the Court of Appeals in this case, but it is a two-paragraph opinion which is most notable for the unbridged distance between its premise and its conclusion. The Court's opinion today at least makes a reasoned defense of the result which it reaches, but I am not persuaded by those reasons. Because of that fact I would not have the slightest reluctance to overrule *Younger* and reverse the judgment of the Court of Appeals in this case.

Reporter's Note

The next page is purposely numbered 901. The numbers between 841 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 23 THROUGH APRIL 25, 1977

FEBRUARY 23, 1977

Affirmed on Appeal. (See No. 75–1328, *ante*, p. 83 n. 16.)

FEBRUARY 25, 1977

Miscellaneous Order

No. A–703. DOBBS *v.* GEORGIA. Sup. Ct. Ga. Application for stay of execution of the sentence of death, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted pending filing of a petition for writ of certiorari on or before the close of business March 9, 1977. In the event a petition for writ of certiorari is so filed, this order is to remain in effect pending this Court's action on petition. Should petition for writ of certiorari be denied, this order is to terminate automatically. In the event petition for writ of certiorari is granted, this order is to remain in effect pending issuance of mandate of this Court. The State of Georgia is requested to file a response to petition for a writ of certiorari as expeditiously as possible. Reported below: 236 Ga. 427, 224 S. E. 2d 3.

FEBRUARY 28, 1977

Affirmed on Appeal

No. 76–954. CUYAHOGA COUNTY BAR ASSN. ET AL. *v.* SUPREME COURT OF OHIO ET AL. Affirmed on appeal from D. C. S. D. Ohio.

Appeals Dismissed

No. 76–5774. P. J. P. *v.* OREGON EX REL. JUVENILE DEPARTMENT OF POLK COUNTY ET AL. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 26 Ore. App. 215, 552 P. 2d 584.

No. 76–5944. CHOCHREK *v.* CUPP, PENITENTIARY SUPERINTENDENT. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 542 F. 2d 1179.

Certiorari Granted—Vacated and Remanded

No. 74–1486. UNITED STATES *v.* BERNSTEIN. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Donovan*, 429 U. S. 413 (1977). Reported below: 509 F. 2d 996.

No. 76–169. UNITED STATES *v.* BARLETTA ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Donovan*, 429 U. S. 413 (1977). Reported below: 533 F. 2d 1395.

No. 76–597. UNITED STATES *v.* CABRAL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Donovan*, 429 U. S. 413 (1977). Reported below: 546 F. 2d 255.

No. 76–720. UNITED STATES *v.* LEE. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Donovan*, 429 U. S. 413 (1977). Reported below: 542 F. 2d 353.

No. 76–5415. GILBERT *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. On representation of the Acting Solicitor General, set forth in his brief for the United States filed February 7, 1977, judgment vacated, and case remanded for reconsideration in light of position presently asserted by the Government. Reported below: 537 F. 2d 118.

No. 76–941. GIBSON, SHERIFF *v.* SMALL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Codd* v. *Velger*, 429 U. S. 624 (1977). Reported below: 541 F. 2d 277.

Miscellaneous Orders

No. D–46. IN RE DISBARMENT OF MARDIAN. It having been reported to the Court that the Supreme Court of California and the United States District Court for the District of Columbia have vacated their orders suspending Robert Charles Mardian from the practice of law, it is ordered that the order of this Court entered March 31, 1975 [420 U. S. 1001], suspending Robert Charles Mardian from the further practice of law in this Court is vacated and that the rule to show cause issued March 31, 1975, is discharged. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

No. 75–1126. TRANS WORLD AIRLINES, INC. *v.* HARDISON ET AL.; and

No. 75–1385. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* HARDISON ET AL. C. A. 8th Cir. [Certiorari granted, 429 U. S. 958.] Motions of New York State Division of Human Rights, Central Conference of American Rabbis et al., General Conference of Seventh-Day Adventists, and American Civil Liberties Union for leave to file briefs as *amici curiae* granted.

No. 75–1771. COMMISSIONER OF INTERNAL REVENUE *v.* STANDARD LIFE & ACCIDENT INSURANCE CO. C. A. 10th Cir. [Certiorari granted, 429 U. S. 814.] Motion of Acting Solicitor General for additional time for oral argument on behalf of petitioner granted and 15 additional minutes allotted for that purpose. Respondent also granted 15 additional minutes for oral argument.

No. 76–99. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. [Certiorari granted, 429 U. S. 1022.] Motion of Texas Association of Business for leave to file a brief as *amicus curiae* granted.

No. 76–143. SPLAWN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 429 U. S. 997.] Motion of Citizens for Decency Through Law, Inc., for leave to file a brief as *amicus curiae* granted.

No. 76–422. DOTHARD, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ALABAMA, ET AL. *v.* RAWLINSON ET AL. Appeal from D. C. M. D. Ala. [Probable jurisdiction noted, 429 U. S. 976.] Motion of the Attorney General of Alabama for additional time for oral argument denied.

No. 76–444. NORTHEAST MARINE TERMINAL CO., INC., ET AL. *v.* CAPUTO ET AL.; and

No. 76–454. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* BLUNDO ET AL. Appeals from C. A. 2d Cir. [Certiorari granted, 429 U. S. 998.] Motion of West Gulf Maritime Assn. for leave to file a brief as *amicus curiae* granted.

No. 76–447. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, 429 U. S. 958.] Motion of Michigan Education Assn. for leave to file a brief as *amicus curiae* denied.

No. 76–931. STOPS ET UX. *v.* LITTLE HORN STATE BANK. Sup. Ct. Mont. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 76–5206. ROBERTS *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 429 U. S. 938.] Motion of Americans for Effective Law Enforcement, Inc., et al., for leave to file a brief as *amici curiae* granted. Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 76–5843. BELL *v.* MALLEY, WARDEN; and
No. 76–6124. BLAKE *v.* THOMPSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 76–930. RAY, GOVERNOR OF WASHINGTON, ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL. Appeal from D. C. W. D. Wash. Probable jurisdiction noted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Granted

No. 76–750. SEARS, ROEBUCK & CO. *v.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS. Sup. Ct. Cal. Certiorari granted. Reported below: 17 Cal. 3d 893, 553 P. 2d 603.

No. 76–938. FEDERAL MARITIME COMMISSION ET AL *v.* PACIFIC MARITIME ASSN. ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 177 U. S. App. D. C. 248, 543 F. 2d 395.

Certiorari Denied. (See also No. 76–5944, *supra.*)

No. 75–500. ANDERSON *v.* UNITED STATES;
No. 75–509. MALLOWAY *v.* UNITED STATES; and
No. 75–513. DOOLITTLE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 518 F. 2d 500.

No. 75–611. GANEM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1068.

No. 75–963. KILGORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 524 F. 2d 957.

No. 75–1393. PRINCIPIE *v.* UNITED STATES; and
No. 75–1394. LABRIOLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 531 F. 2d 1132.

No. 75–1813. CIVELLA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 533 F. 2d 1395.

No. 75–1816. LABRIOLA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 51 App. Div. 2d 713, 380 N. Y. S. 2d 1019.

No. 75–1838. GREEN *v.* UNITED STATES; and
No. 75–6957. HILL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 1262.

No. 75–6944. SCHWARTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 160.

No. 76–232. HAINA *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 30 Md. App. 295, 352 A. 2d 874.

No. 76–414. KILCULLEN *v.* UNITED STATES; and
No. 76–5509. REDDALL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 546 F. 2d 435.

No. 76–654. PARKER *v.* SOUTH LOUISIANA CONTRACTORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 113.

No. 76–747. PENT-R-BOOKS, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 519.

No. 76–783. HO CHUNG TSAO ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 667.

No. 76–787. PRASSE *v.* UNITED STATES; and LEBONICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 425.

No. 76–826. ILLINOIS TERMINAL RAILROAD CO. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 201.

No. 76–843. CASCO BANK & TRUST CO. ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 544 F. 2d 528.

No. 76–853. STASSI *v.* UNITED STATES; and
No. 76–865. STASSI, AKA ROGERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 579.

No. 76–858. GOULD, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 1176.

No. 76–861. CANNON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 959.

No. 76–946. WALTON *v.* WALTON, A MINOR, BY BAKER. Dist. Ct. Colo., Jefferson County. Certiorari denied.

No. 76–949. GIBSON *v.* MISSOURI. Ct. App. Mo., Springfield Dist. Certiorari denied. Reported below: 540 S. W. 2d 952.

No. 76–952. INMOBILIARIA MELIA DE PUERTO RICO, INC. *v.* PAINE, WEBBER, JACKSON & CURTIS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 3.

No. 76–953. RONWIN *v.* SPECIAL COMMITTEE ON EXAMINATIONS AND ADMISSIONS OF THE ARIZONA SUPREME COURT. Sup. Ct. Ariz. Certiorari denied.

No. 76–955. DOVER CONVEYOR & EQUIPMENT CO., INC. *v.* OHIO SAVINGS & TRUST CO. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 76–1064. ROSSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 814.

No. 76–5522. ROSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 750.

No. 76–5535. CAPASSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 512.

No. 76–5561. MYERS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 76, 538 F. 2d 424.

No. 76–5563. ALLEN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 630.

No. 76–5672. FIELDS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 573.

No. 76–5678. THACKER *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 76–5730. PROCTOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 331.

No. 76–5733. LOVELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 76–5740. FORD *v.* PITCHESS. Sup. Ct. Cal. Certiorari denied.

No. 76–5748. TESTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 428.

No. 76–5759. AARON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 29 N. C. App. 582, 225 S. E. 2d 117.

No. 76–5766. TARAVELLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 898.

No. 76–5769. WALLACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 770.

No. 76–5779. ERICKSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 37 Ill. App. 3d 418, 346 N. E. 2d 82.

No. 76–5787. JERMENDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 640.

No. 76–5792. HAUGEN *v.* BRYAN. Sup. Ct. Nev. Certiorari denied.

No. 76–5800. COWDEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 545 F. 2d 257.

No. 76–5803. LEVINGSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 521.

No. 76–5807. KARKARIA *v.* KARKARIA. Super. Ct. Pa. Certiorari denied. Reported below: 241 Pa. Super. 554, 358 A. 2d 84.

No. 76–5824. AUSTING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76–5846. BOYD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 538 F. 2d 314.

No. 76–5885. RAYGOSA-GAETA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76–5917. SWANSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 1172.

No. 76–5925. NEIKIRK *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 260 Ark. 526, 542 S. W. 2d 282.

No. 76–5999. BOLUS *v.* ENGLE ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 48 Ohio St. 2d 3, 355 N. E. 2d 493.

No. 76–6000. CAVER *v.* ALABAMA; and WHITE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1333 (first case); 541 F. 2d 1092 (second case).

No. 76–6002. ROY *v.* MANCHESTER GAS CO. C. A. D. C. Cir. Certiorari denied.

No. 76–6006. FELIX *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 92.

No. 76–6008. CAMPISE *v.* HAMILTON, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 76–6013. TRIBBITT *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 840.

No. 76–6015. MOTTU *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 76–6022. BRADLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6098. MELVIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 767.

No. 76–6108. OSBORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 574.

No. 76–6110. SLEDGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 1120.

No. 76–6123. TEFSA, AKA TEFFA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 138.

No. 76–6128. DANISE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 548 F. 2d 42.

No. 76–6137. POWLESS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 546 F. 2d 792.

No. 76–768. RIOS ET AL. *v.* ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U. A., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 542 F. 2d 579.

Rehearing Denied

No. 75–1318. PEARSON *v.* DODD ET AL., 429 U. S. 396;

No. 76–566. IACONETTI *v.* UNITED STATES, 429 U. S. 1041;

No. 76–569. NEW YORK SHIPPING ASSN., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 429 U. S. 1041;

No. 76–570. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 429 U. S. 1041;

No. 76–622. JOHNSON BRONZE CO. *v.* OSTAPOWICZ, 429 U. S. 1041;

No. 76–5408. MANVILLE *v.* MICHIGAN, 429 U. S. 1063;

No. 76–5427. BURBANK *v.* WARDEN, ILLINOIS STATE PENITENTIARY, 429 U. S. 1045;

No. 76–5473. GUERRA *v.* UNITED STATES, 429 U. S. 1046;

No. 76–5531. KELLEY *v.* UNITED STATES ET AL., 429 U. S. 1047;

No. 76–5556. SELLARS *v.* ESTELLE, CORRECTIONS DIRECTOR, 429 U. S. 1076;

No. 76–5731. BERRYHILL *v.* GEORGIA, 429 U. S. 1054; and

No. 76–5763. MAYFIELD *v.* UNITED STATES, 429 U. S. 1071. Petitions for rehearing denied.

No. 76–5414. POWELL *v.* CALIFORNIA, 429 U. S. 1032. Motion for leave to file petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit for the purpose of hearing and deciding the matter of *Taylor* v.

American Bar Association, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

March 7, 1977

Affirmed on Appeal

No. 76–976. Roundtree et al. *v.* Berger, Commissioner, Department of Social Services of New York, et al. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 420 F. Supp. 282.

Appeals Dismissed

No. 76–699. American Party of Idaho et al. *v.* Evans, Chairman, State Board of Examiners, et al. Appeal from D. C. Idaho dismissed for want of jurisdiction.

No. 76–995. Drewett et al. *v.* Louisiana. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 338 So. 2d 288.

No. 76–5820. Maynard *v.* New York. Appeal from Sup. Ct. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 75–1706. National Labor Relations Board *v.* Local 742, United Brotherhood of Carpenters & Joiners of America, et al.; and

No. 75–1755. J. L. Simmons Co., Inc. *v.* Local 742, United Brotherhood of Carpenters & Joiners of America, et al. C. A. D. C. Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *NLRB* v. *Pipefitters*, 429 U. S. 507 (1977). Reported below: 174 U. S. App. D. C. 456, 533 F. 2d 683.

Certiorari Granted—Reversed. (See No. 76–867, *ante*, p. 308.)

Miscellaneous Orders

No. A–655 (76–1193). ROBB, FORMER DIRECTOR OF DEPARTMENT OF MENTAL HEALTH, ET AL. *v.* KENNEDY. Application for recall and stay of mandate of the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–709. MELVIN *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the First Circuit and for bail pending timely filing of a petition for writ of certiorari, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 546 F. 2d 1.

No. 75–1605. NIXON *v.* ADMINISTRATOR OF GENERAL SERVICES ET AL. Appeal from D. C. D. C. Cir. [Probable jurisdiction noted, 429 U. S. 976.] Motion of appellees for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellant also allotted 15 additional minutes for oral argument.

No. 75–1771. COMMISSIONER OF INTERNAL REVENUE *v.* STANDARD LIFE & ACCIDENT INSURANCE CO. C. A. 10th Cir. [Certiorari granted, 429 U. S. 814.] Motion of Lincoln National Life Insurance Co. for leave to file a brief as *amicus curiae* granted.

No. 76–422. DOTHARD, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ALABAMA, ET AL. *v.* RAWLINSON ET AL. Appeal from D. C. M. D. Ala. [Probable jurisdiction noted, 429 U. S. 976.] Motions of Women's Legal Defense Fund et al. and American Civil Liberties Union for leave to file briefs as *amici curiae* granted.

No. 76–423. PUYALLUP TRIBE, INC., ET AL. *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL. Sup. Ct. Wash. [Certiorari granted, 429 U. S. 976.] Motion of respondents Northwest Steelheaders Council of Trout, Unlimited, et al. for additional time for oral argument denied. Alternative request for divided argument granted.

No. 76–447. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL. C. A. 6th Cir. [Certiorari granted, 429 U. S. 958.] Motion of respondent Detroit Board of Education to argue on behalf of all respondents denied. Divided argument on behalf of respondents allowed.

No. 76–496. WOLMAN ET AL. *v.* ESSEX, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL. Appeal from D. C. S. D. Ohio. [Probable jurisdiction noted, 429 U. S. 1037.] Motion of National Coalition for Public Education and Religious Liberty for leave to file a brief as *amicus curiae* granted.

Probable Jurisdiction Noted

No. 76–558. RAYMOND MOTOR TRANSPORTATION, INC., ET AL. *v.* RICE, SECRETARY, WISCONSIN DEPARTMENT OF TRANSPORTATION, ET AL. Appeal from D. C. W. D. Wis. Probable jurisdiction noted. MR. JUSTICE STEVENS took no part in the consideration or decision of this appeal. Reported below: 417 F. Supp. 1352.

Certiorari Denied. (See also No. 76–5820, *supra.*)

No. 76–697. NORTHRUP *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari denied.

No. 76–863. A. LASAPONARA & SONS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 2d 992.

No. 76–913. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76–936. EMPIRE GAS CORP. ET AL. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 547 F. 2d 1147.

No. 76–948. LEIB ET AL. *v.* TWENTIETH CENTURY CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 76–958. COMMERCE UNION BANK, TRUSTEE, ET AL. *v.* KINKADE ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 540 S. W. 2d 861.

No. 76–960. JOHNSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 265 Ind. 470, 355 N. E. 2d 240.

No. 76–964. RICHARD'S LUMBER & SUPPLY CO. ET AL. *v.* KAUFMAN & BROAD HOMES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 2d 18.

No. 76–965. PURER *v.* JORDAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76–966. WOLF ET AL. *v.* TRANS WORLD AIRLINES, INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 134.

No. 76–973. ARIZONA ET AL. *v.* COOK PAINT & VARNISH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 226.

No. 76–977. VOLVO OF AMERICA CORP. *v.* SCHWARZER, U. S. DISTRICT JUDGE (ROSACK, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 76–980. IN RE KRAFT. Sup. Ct. Idaho. Certiorari denied.

No. 76–983. GOSPER *v.* FANCHER ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 40 N. Y. 2d 867, 356 N. E. 2d 479.

No. 76–985. GEVYN CONSTRUCTION CORP. *v.* LIMBACH CO. C. A. 1st Cir. Certiorari denied. Reported below: 544 F. 2d 1104.

No. 76–991. KOTTIS, ADMINISTRATRIX *v.* UNITED STATES STEEL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 543 F. 2d 22.

No. 76–993. RONALD F. RIVIERE, D. D. S., INC. *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 76–998. WIENER KING, INC. *v.* WIENER KING CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 421.

No. 76–1011. WALGREEN LOUISIANA CO., INC., ET AL. *v.* CITY OF NEW ORLEANS ET AL. Sup. Ct. La. Certiorari denied. Reported below: 337 So. 2d 1081.

No. 76–1044. ESTATE OF WHITLOCK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 547 F. 2d 506.

No. 76–1046. VOELLER *v.* VOELLER. Super. Ct. N. J. Certiorari denied.

No. 76–1054. CATANZARO *v.* CENTRAL GULF STEAMSHIP CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–1092. FALCONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 607.

No. 76–1101. IVLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1160.

No. 76–1103. BERAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 546 F. 2d 1316.

No. 76–5599. BENITEZ-CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76–5602. BALDWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76–5752. ARMEDO-SARMIENTO *v.* UNITED STATES;
No. 76–5764. ROLDAN *v.* UNITED STATES;
No. 76–6135. RODRIGUEZ-PARRA *v.* UNITED STATES; and
No. 76–6171. MONTES-GOMEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 785.

No. 76–5785. CLARK *v.* MALLEY, WARDEN. Sup. Ct. N. M. Certiorari denied.

No. 76–5809. KLINE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 73 Wis. 2d 337, 243 N. W. 2d 519.

No. 76–5811. ATWELL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 279.

No. 76–5812. RUNKLE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 708.

No. 76–5832. AINSWORTH *v.* REED, PENITENTIARY SUPERINTENDENT. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 243.

No. 76–5841. TOWNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76–5857. GALLIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76–5876. STOCKWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 428.

No. 76–5879. WITHERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–5886. RUDD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76–5894. SCLAFANI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 536 F. 2d 703.

No. 76–5897. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 932.

No. 76–5900. CHEW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 309.

No. 76–5903. ALVAREZ *v.* DISTRICT DIRECTOR, U. S. IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 539 F. 2d 1220.

No. 76–5977. FOX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76–5989. BEITLING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 1106.

No. 76–6016. LOVE *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 520.

No. 76–6018. ASH *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 244 N. W. 2d 812.

No. 76–6020. SMITH *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6032. RADO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 74, 372 A. 2d 159.

No. 76–6035. MALLEY *v.* MANSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 25.

No. 76–6036. BROWN *v.* FLORIDA. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 322 So. 2d 73.

No. 76–6041. MICHELE *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 76–6049. JONES *v.* BRIERTON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 520.

No. 76–6050. HUFFMAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76–6051. TUCKER *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 76–6053. KAWAMURA *v.* VERSKA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6057. OWENS *v.* OFFICE OF THE DEAN, RUTGERS LAW SCHOOL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 418.

No. 76–6088. ZAPATA *v.* WATKINS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1168.

No. 76–6127. REFUGE *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6129. BABSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6139. BLACKWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 799.

No. 76–6143. DEVOLL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76–6157. PEARCE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6164. WUESCHINSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1166.

No. 76–6165. MCINTOSH ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1048.

No. 76–6168. BUSBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6170. WATTERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1297.

No. 76–6182. WOODS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 277, 546 F. 2d 1043.

No. 76–493. ESTELLE, CORRECTIONS DIRECTOR *v.* MABRY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 532 F. 2d 184.

No. 76–530. MARTINEZ, ADMINISTRATRIX *v.* SHROCK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 537 F. 2d 765.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Petitioner's decedent, a retired Army sergeant, died shortly after undergoing a gall bladder operation performed by respondents, two Army surgeons. Petitioner instituted survival and wrongful-death claims under New Jersey law in the Superior Court of New Jersey. Respondents removed the action to the United States District Court. The District Court dismissed the complaint on the ground that respondents were absolutely immune from personal liability for acts done within the scope of their official duties under *Barr* v. *Mateo*, 360 U. S. 564 (1959). The Court of Appeals for the Third Circuit, sitting en banc, affirmed.

The Court of Appeals placed principal reliance on its decision in *Bailey* v. *DeQuevedo*, 375 F. 2d 72, cert. denied, 389 U. S. 923 (1967), which in turn relied heavily upon *Feres* v. *United States*, 340 U. S. 135 (1950). In *Feres* the Court held that the United States was not subject to suit under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 and 2671 *et seq.* (1970 ed. and Supp. V), for injuries resulting from the negligence of an Army surgeon in the performance of his duties. In *Bailey* the Third Circuit applied this rule to bar a diversity suit arising under state law against an Army surgeon personally.

The Court of Appeals' reliance on *Feres* and *Bailey* deserves further scrutiny. First, in both *Feres* and *Bailey* the persons injured were active-duty military personnel, a fact critical to the reasoning in both decisions, while petitioner's decedent was in a retired status at the time that the injury occurred. This Court has held that *Feres* does not apply where, as here, the person injured is a discharged veteran of the Armed Services. *United States* v. *Brown*, 348 U. S. 110 (1954). Second, the question presented in *Bailey*—whether the decision in *Feres*, which involved a statutory interpretation of the Tort Claims Act, creates an unqualified personal immunity for military physicians from suits arising under state law—has never been decided by this Court.

In the past, when Congress has seen fit to immunize certain categories of federal officials, including physicians, from suit, it has done so by statute. See 38 U. S. C. § 4116 (1970 ed. and Supp. V); 42 U. S. C. § 233. No such statute was applicable in this case.* Apart from these statutes, this Court has recognized a very narrow category of judicially created absolute immunity for some federal officials. See *Barr* v. *Mateo*, *supra*. However, such absolute immunity heretofore has only been applied to policymaking officials, and nowhere has it been suggested that there is a judicially created unqualified immunity for Government functionaries operating at respondents' level. Indeed, when faced with precisely the

*On October 8, 1976, after the Third Circuit's decision in this case, Congress by statute declared that an action against the United States is the sole remedy for injuries resulting from the negligent or wrongful acts or omissions of medical personnel in the Armed Forces, 90 Stat. 1985, 10 U. S. C. § 1089 (1976 ed.), thereby extending statutory immunity to Army surgeons such as respondents. This statute was not made retroactive, however, and therefore has no applicability to this case. Because the decision below has broader implications than presented by the narrow facts of this case, the enactment of the new statute does not detract from the utility of affording plenary consideration to the issues here presented.

same issue presented here, the Court of Appeals for the District of Columbia Circuit held that an Army medical officer was not entitled to absolute immunity from suit. *Henderson* v. *Bluemink*, 167 U. S. App. D. C. 161, 511 F. 2d 399 (1974). Hence, there is a square conflict between the Third Circuit and the District of Columbia Circuit as to the proper resolution of the issue presented in this case.

In order to decide the serious, unsettled question presented here, and to resolve the Circuit conflict, I would grant the petition for certiorari.

No. 76–781. EXXON CORP. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 540 F. 2d 1023.

No. 76–870. MINNESOTA PUBLIC INTEREST RESEARCH GROUP *v.* SECRETARY OF AGRICULTURE ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 541 F. 2d 1292.

No. 76–988. BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., ET AL. *v.* BALLARD ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 543 F. 2d 1075.

No. 76–5854. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate the judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). MR. JUSTICE WHITE would grant certiorari limited to Questions 1 and 2 presented by the petition. Reported below: 540 S. W. 2d 693.

Rehearing Denied

No. 75–1694. JONES ET AL. *v.* NEW YORK CITY HUMAN RESOURCES ADMINISTRATION ET AL., 429 U. S. 825;

No. 76–459. COMMUNICATIONS WORKERS OF AMERICA *v.* WESTERN ELECTRIC CO., INC., ET AL., 429 U. S. 1067;

No. 76–851. ALBERT ET AL. *v.* FIRST NATIONAL BANK & TRUST COMPANY OF MARQUETTE, EXECUTOR, 429 U. S. 1074;

No. 76–5380. RICKETTS *v.* TEXAS ET AL., 429 U. S. 1063;

No. 76–5577. JENKINS ET AL. *v.* UNITED STATES, 429 U. S. 1079;

No. 76–5619. CRANE *v.* HINSHAW ET AL., 429 U. S. 1064;

No. 76–5816. CRANE *v.* RAM ENTERPRISES, INC., 429 U. S. 1077;

No. 76–5817. CRANE *v.* CITY OF SAN DIEGO ET AL., 429 U. S. 1077;

No. 76–5818. CRANE *v.* COUNTY OF RIVERSIDE ET AL., 429 U. S. 1077;

No. 76–5822. SMOCK *v.* KESSLER, JUDGE, ET AL., 429 U. S. 1077; and

No. 76–5844. JOHNSON *v.* MALLEY, WARDEN, 429 U. S. 1059. Petitions for rehearing denied.

No. 75–6490. ESCOBAR-ORDONEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE, 426 U. S. 938. Motion for leave to file petition for rehearing denied.

MARCH 8, 1977

Dismissal Under Rule 60

No. 76–950. WOBB *v.* FORD MOTOR CO. ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60.

MARCH 11, 1977

Dismissal Under Rule 60

No. 76–5780. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 542 F. 2d 1168.

MARCH 21, 1977

Dismissals Under Rule 60

No. 75–765. COFFIN *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; and

No. 75–791. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* COFFIN. Appeals from D. C. D. C. dismissed under this Court's Rule 60. Reported below: 400 F. Supp. 953.

Affirmed on Appeal

No. 75–712. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* SILBOWITZ ET UX. Affirmed on appeal from D. C. S. D. Fla. Reported below: 397 F. Supp. 862.

No. 75–727. JABLON ET VIR *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; and

No. 75–739. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* JABLON ET VIR. Affirmed on appeal from D. C. Md. Reported below: 399 F. Supp. 118.

No. 76–772. COUNTY COMMISSION OF HALE COUNTY ET AL. *v.* UNITED STATES. Affirmed on appeal from D. C. S. D. Ala. Reported below: 425 F. Supp. 433.

No. 76–802. HOWARD *v.* REAL ESTATE COMMISSION OF COLORADO. Affirmed on appeal from D. C. Colo.

No. 75–1643. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* ABBOTT ET UX. Appeal from D. C. N. D. Ohio. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed.

No. 76–1038. ALLEN ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. Affirmed on appeal from D. C. E. D. Mich. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would postpone jurisdiction to a hearing of case on the merits. Reported below: 419 F. Supp. 1002.

No. 76–1039. WILSON *v.* WILSON ET AL. Affirmed on appeal from D. C. Ore. Reported below: 416 F. Supp. 984.

Appeals Dismissed

No. 76–1013. TEXAS EASTERN TRANSMISSION CORP. *v.* KINGSLEY, DIRECTOR, DIVISION OF TAXATION. Appeal from Super. Ct. N. J. dismissed for want of substantial federal question.

No. 76–1043. HENNIGAN *v.* LOUISIANA STATE BAR ASSN. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 340 So. 2d 264.

No. 76–6167. BUSTELL *v.* BUSTELL. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: 170 Mont. 457, 555 P. 2d 722.

No. 76–1034. MOREAU *v.* TONRY ET AL. Appeal from Sup. Ct. La. dismissed for want of properly presented federal question. Reported below: 339 So. 2d 3.

No. 76–6148. REISER *v.* HUNTINGTON NATIONAL BANK ET AL. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 75–1663. FRIEDMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Marks* v. *United States, ante,* p. 188. Reported below: 528 F. 2d 784.

No. 76–728. MENTAL PATIENT CIVIL LIBERTIES PROJECT ET AL. *v.* DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of 90 Stat. 2641, 42 U. S. C. § 1988 (1976 ed.). Reported below: 541 F. 2d 275.

Certiorari Granted—Reversed and Remanded. (See No. 76–5881, *ante*, p. 322; and No. 76–5920, *ante*, p. 325.)

Miscellaneous Orders

No. A–710. PEARSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Renewed application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–514 (76–902). OLSEN *v.* GOODMAN. Application for stay of trial in the 11th Judicial Circuit, in and for Dade County, Fla., presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–60. IN RE DISBARMENT OF HOFFER. Disbarment entered. [For earlier order herein, see 429 U. S. 913.]

No. D–61. IN RE DISBARMENT OF HEMLOCK. Disbarment entered. [For earlier order herein, see 429 U. S. 913.]

No. D–63. IN RE DISBARMENT OF SMILEY. Disbarment entered. [For earlier order herein, see 429 U. S. 913.]

No. D–71. IN RE DISBARMENT OF MASON. Disbarment entered. [For earlier order herein, see 429 U. S. 936.]

No. D–72. IN RE DISBARMENT OF MANER. Disbarment entered. [For earlier order herein, see 429 U. S. 936.]

No. D–77. IN RE DISBARMENT OF LACINAK. Disbarment entered. [For earlier order herein, see 429 U. S. 937.]

No. D–78. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 429 U. S. 937.]

No. D–94. IN RE DISBARMENT OF ESBER. Disbarment entered. [For earlier order herein, see 429 U. S. 1035.]

No. D–96. IN RE DISBARMENT OF HOFFMANN. It is ordered that Joseph L. Hoffmann, of Monongahela, Pa., be suspended from the practice of law in this Court and that a rule

issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–98. IN RE DISBARMENT OF RENSHAW. It is ordered that Robert E. Renshaw, of Springfield, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–1126. TRANS WORLD AIRLINES, INC. *v.* HARDISON ET AL.; and

No. 75–1385. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* HARDISON ET AL. C. A. 8th Cir. [Certiorari granted, 429 U. S. 958.] Motion of National Jewish Commission on Law and Public Affairs for leave to participate in oral argument as *amicus curiae* in support of respondents granted.

No. 75–1874. JONES, SECRETARY, DEPARTMENT OF CORRECTION OF NORTH CAROLINA, ET AL. *v.* NORTH CAROLINA PRISONERS' LABOR UNION, INC. Appeal from D. C. E. D. N. C. [Probable jurisdiction noted, 429 U. S. 976.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* granted and five additional minutes allotted for that purpose.

No. 75–6909. MANESS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. [Certiorari granted, 429 U. S. 893.] Motion of George R. Georgieff, Esquire, to permit Arthur Joel Berger, Esquire, to argue *pro hac vice* on behalf of respondent granted. Motion of petitioner for additional time for oral argument, or in the alternative for divided argument, denied. Motion to strike portions of respondent's brief denied.

No. 75–1181. BATTERTON, SECRETARY, DEPARTMENT OF HUMAN RESOURCES OF MARYLAND, ET AL. *v.* FRANCIS ET AL. C. A. 4th Cir. [Certiorari granted, 429 U. S. 939.] Motion of the Chamber of Commerce of the United States for divided argument and/or additional time for oral argument denied.

No. 76–63. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* WASHINGTON STATE APPLE ADVERTISING COMMISSION. Appeal from D. C. E. D. N. C. [Probable jurisdiction postponed, *sub nom. Holshouser.* v. *Washington State Apple Advertising Comm'n*, 429 U. S. 814.] Motion of appellee for leave to file supplemental brief after argument granted.

No. 76–423. PUYALLUP TRIBE, INC., ET AL. *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL. Sup. Ct. Wash. [Certiorari granted, 429 U. S. 976.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 76–919. FORT BELKNAP INDIAN COMMUNITY, FORT BELKNAP INDIAN RESERVATION *v.* DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, ET AL. Sup. Ct. Mont. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 76–5187. LEE *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 429 U. S. 1037.] Motion for appointment of counsel granted, and it is ordered that Joseph P. Bauer, Esquire, of Notre Dame, Ind., be appointed to serve as co-counsel for petitioner in this case.

No. 76–5416. JONES *v.* HILDEBRANT ET AL. Sup. Ct. Colo. [Certiorari granted, 429 U. S. 1061.] Motion of Lawyers' Committee for Civil Rights Under Law et al. for leave to file a brief as *amici curiae* granted.

No. 76–5206. ROBERTS *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 429 U. S. 938.] Motion of the Attorney General of New York for leave to participate in oral argument as *amicus curiae* granted. Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 76–6107. DOVE *v.* NEW YORK ET AL.;

No. 76–6125. MAGEE *v.* WEST, U. S. DISTRICT JUDGE; and

No. 76–6147. HENRY *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 76–1057. KEY ET AL. *v.* DOYLE ET AL. Appeal from Ct. App. D. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 365 A. 2d 621.

Certiorari Granted

No. 76–5935. DURST ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 549 F. 2d 799.

Certiorari Denied. (See also No. 76–6148, *supra.*)

No. 75–1843. CROW DOG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 532 F. 2d 1182.

No. 76–104. COMMUNITY SCHOOL BOARD OF BROOKLYN, NEW YORK DISTRICT NO. 14, ET AL. *v.* HUNTLEY. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 979.

No. 76–450. INGRAM CORP. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 541 F. 2d 166.

No. 76–625. HUNTLEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 1400.

No. 76–671. SOLITRON DEVICES, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 352, 537 F. 2d 417.

No. 76–686. DALEY *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 536 F. 2d 519.

No. 76–729. GIBSON ET AL. *v.* GRIMM, JUDGE. Sup. Ct. Mo. Certiorari denied. Reported below: 540 S. W. 2d 17.

No. 76–754. B. F. GOODRICH CO. ET AL. *v.* UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 541 F. 2d 1178.

No. 76–770. CAHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–773. GORDON ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 211 Ct. Cl. 310, 546 F. 2d 430.

No. 76–784. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. *v.* BERNS. C. A. 2d Cir. Certiorari denied. Reported below: 537 F. 2d 714.

No. 76–789. NOLL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–790. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 1204.

No. 76–799. ALBERTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76–820. OKAGBARE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied.

No. 76–827. LAMBROS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 544 F. 2d 962.

No. 76–840. TEXAS INDUSTRIAL ACCIDENT BOARD ET AL. *v.* INDUSTRIAL FOUNDATION OF THE SOUTH. Sup. Ct. Tex. Certiorari denied. Reported below: 540 S. W. 2d 668.

No. 76–876. MACDONALD, CHAIRMAN, NAVAJO TRIBAL COUNCIL *v.* SEKAQUAPTEWA, CHAIRMAN, HOPI TRIBAL COUNCIL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 396.

No. 76–881. FIRST BANK & TRUST CO. *v.* BLOOM, ACTING COMPTROLLER OF THE CURRENCY, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 545 F. 2d 752.

No. 76–895. WHEATON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 546 F. 2d 6.

No. 76–897. HESS, TRUSTEE, ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 483, 537 F. 2d 457.

No. 76–915. PATRICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 542 F. 2d 381.

No. 76–921. RAPOPORT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 802.

No. 76–997. KANNISTO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 841.

No. 76–1002. LAHMANN *v.* HAUBROCK ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 76–1004. CASTLEWOOD INTERNATIONAL CORP. *v.* DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 269, 543 F. 2d 416.

No. 76–1014. BEDELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 260 Ark. 401, 541 S. W. 2d 297.

No. 76–1017. GRANT *v.* PARKE, DAVIS & Co. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 521.

No. 76–1024. BAUM *v.* ANDERSON. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 1166.

No. 76–1031. PAPPAGEORGE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1041. HARRIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 260 Ark. 420, 540 S. W. 2d 859.

No. 76–1045. DWYER ET AL. *v.* CLIMATROL INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 307.

No. 76–1049. BAKER ET UX. *v.* BRIGGS, ADMINISTRATOR; and BAKER ET UX. *v.* PIHL, JUDGE. C. A. 9th Cir. Certiorari denied.

No. 76–1050. CAPLAN *v.* HOWARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76–1051. CRABBE ET AL. *v.* HORD. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 536 S. W. 2d 409.

No. 76–1055. TUCKER *v.* PEOPLES SAVINGS BANK, BRIDGEPORT. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 686, 365 A. 2d 632.

No. 76–1059. ELKINS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 76–1063. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: 172 Conn. 675, 364 A. 2d 643.

No. 76–1108. RILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 237.

No. 76–1129. Coco *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 573.

No. 76–1147. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–1155. BERZONSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1164.

No. 76–1158. KELLEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 619.

No. 76–1173. KLEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–1181. ROSENBERG ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–5581. MORROW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 541 F. 2d 1229.

No. 76–5683. FARRIES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 1167.

No. 76–5696. SHAW *v.* BRISCOE, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 489.

No. 76–5739. THURMOND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 774.

No. 76–5776. PAYNE *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–5788. MCGRATH *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 10th Cir. Certiorari denied. Reported below: 541 F. 2d 249.

No. 76–5797. MOORE *v.* RISTAINO ET AL. C. A. 1st Cir. Certiorari denied.

No. 76–5815. ZANNIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 331.

No. 76–5821. REESE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–5826. PHILION *v.* HARRIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1180.

No. 76–5833. WORTHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 428.

No. 76–5864. CLAY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 542 F. 2d 1283.

No. 76–5865. JOHNSON *v.* MISSOURI. Ct. App. Mo., St. Louis District. Certiorari denied. Reported below: 539 S. W. 2d 493.

No. 76–5868. SMITH *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 708.

No. 76–5880. DELUCA *v.* UNITED STATES; and
No. 76–5947. WALLACE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–5883. ROOTS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 76–5893. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 941.

No. 76–5914. YOUNG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 541 F. 2d 331.

No. 76–5931. SPOON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 523.

No. 76–5934. STARR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–5957. ARMENTROUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 526.

No. 76–5958. WALKER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 2d 620, 387 N. Y. S. 2d 341.

No. 76–5963. BRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 471.

No. 76–5965. SINCLAIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1176.

No. 76–5967. HILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–5970. BATTLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76–5974. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 523.

No. 76–5978. JAMES *v.* TENNYSON. C. A. 8th Cir. Certiorari denied.

No. 76–5982. FRANKS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 567.

No. 76–5991. MUSOLINO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 2d 22, 386 N. Y. S. 2d 710.

No. 76–6007. LOVELL *v.* LORA ET AL. C. A. 1st Cir. Certiorari denied.

No. 76–6043. JORDAN *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 421.

No. 76–6055. DUNSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 76–6059. HARRIS *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76–6061. BLUVER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 2d 764, 387 N. Y. S. 2d 994.

No. 76–6069. MAKAL *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 1030.

No. 76–6071. GOULD *v.* WFF-N-PROOF ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 176 U. S. App. D. C. 240, 539 F. 2d 242.

No. 76–6074. LEITZEL *v.* STAPLETON ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 236 Pa. Super. 718, 348 A. 2d 750.

No. 76–6077. CLARK ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 340 So. 2d 208.

No. 76–6079. RODRIGUEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1385.

No. 76–6080. O'LEARY *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 65 Ill. 2d 268, 357 N. E. 2d 491.

No. 76–6084. MORGAN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 310 Minn. 88, 246 N. W. 2d 165.

No. 76–6085. SHADD *v.* TRIDICO ET AL. C. A. 3d Cir. Certiorari denied.

No. 76–6086. FORRESTER *v.* NEW YORK UNIVERSITY. C. A. 2d Cir. Certiorari denied.

No. 76–6092. WRINKLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 76–6101. LOGAN *v.* CAPPS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 1171.

No. 76–6109. FULSOM *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 76–6113. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 2d 831.

No. 76–6117. DUNBAR *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76–6121. GOEWEY *v.* COCHRANE. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 422.

No. 76–6173. FASICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6175. PILLIS *v.* DISTRICT OF COLUMBIA HACKERS' LICENSE APPEAL BOARD. Ct. App. D. C. Certiorari denied. Reported below: 366 A. 2d 1094.

No. 76–6179. SHAW *v.* MANUFACTURERS & TRADERS TRUST CO. C. A. 2d Cir. Certiorari denied.

No. 76–6185. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–6186. CRUZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1171.

No. 76–6187. HENDRIX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 438.

No. 76–6197. ANGUIANO-ARREOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–6198. GERMANY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6206. OLLIE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6207. McGHEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 529 F. 2d 521.

No. 76–6209. GONZALES, AKA TORRES-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6214. ARGUMEDO-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 809.

No. 76–6215. SLATER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 76–6218. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76–6219. HEATH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6226. THOMPSON *v.* LAFFOON ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6227. FIELHAUER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–6232. BREEZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1174.

No. 76–6285. LEWIS *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–985. AMERICAN THEATRE CORP. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 526 F. 2d 48.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the District of Nebraska of knowingly transporting by common carrier in interstate commerce two obscene films

in violation of 18 U. S. C. § 1462. The Court of Appeals for the Eighth Circuit affirmed. 526 F. 2d 48.

Title 18 U. S. C. § 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .
>
> . . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Eighth Circuit was rendered after *Orito*, reverse. In that circumstance, I have no occasion to consider whether the other questions presented by petitioners merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent

in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 76–188. GOURLEY, DIRECTOR, DIVISION OF FAMILY SERVICES OF MISSOURI, ET AL. *v.* LEWIS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 534 F. 2d 794.

No. 76–917. HORWATH ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 539 F. 2d 1093.

No. 76–974. PEABODY COAL CO. *v.* LOCAL UNION NO. 1734 ET AL., UNITED MINE WORKERS OF AMERICA. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 543 F. 2d 10.

No. 76–1023. FRANCHISE REALTY INTERSTATE CORP. ET AL. *v.* SAN FRANCISCO LOCAL JOINT EXECUTIVE BOARD OF CULINARY WORKERS ET AL. C. A. 9th Cir. Motion of Ernest W. Hahn, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 542 F. 2d 1076.

No. 76–1027. HENDERSON, CORRECTIONAL SUPERINTENDENT *v.* LEWIS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 76–1084. GATES, CHAIRMAN, BOARD OF PAROLE OF CONNECTICUT, ET AL. *v.* DELORENZO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 544 F. 2d 82.

No. 76–1028. AZALEA DRIVE-IN THEATRE, INC., ET AL. *v.* SARGOY ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 540 F. 2d 713.

No. 76–5834. ROSENFELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 545 F. 2d 98.

No. 76–6066. IN RE DONNELLY. C. A. 1st Cir. Certiorari and other relief denied.

Rehearing Denied

No. 76–710. BOARD OF EDUCATION OF JEFFERSON COUNTY ET AL. *v.* NEWBURG AREA COUNCIL, INC., ET AL., 429 U. S. 1074;

No. 76–5550. TYLER *v.* RYAN ET AL., 429 U. S. 1076; and

No. 76–5951. HAMBURG *v.* WYOMING, 429 U. S. 1083. Petitions for rehearing denied.

No. 75–753. BOYD *v.* UNITED STATES, 424 U. S. 911; and

No. 76–5913. SANDERS *v.* UNITED STATES, 429 U. S. 1066. Motions for leave to file petitions for rehearing denied.

No. 76–753. BORRI *v.* SIVERSON, 429 U. S. 1078. Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for rehearing denied.

MARCH 28, 1977

Appeal Dismissed

No. 76–1065. MCINTOSH *v.* ANAHEIM UNION HIGH SCHOOL DISTRICT ET AL. Appeal from Ct. App. Cal., 4th App.

Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 76–256. GATHRIGHT, CORRECTIONAL SUPERINTENDENT *v.* CAMPBELL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stone* v. *Powell*, 428 U. S. 465 (1976). Reported below: 538 F. 2d 323.

No. 76–5884. GARNER *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. On representation of the Acting Solicitor General set forth in his memorandum for the United States filed March 17, 1977, judgment vacated, and case remanded for reconsideration in light of position presently asserted by the Government. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST would deny the petition for writ of certiorari. Reported below: 538 F. 2d 128.

Miscellaneous Orders

No. A–732 (76–833). MORROW *v.* GREYHOUND LINES, INC., 429 U. S. 1095. Application to stay effectiveness of order denying certiorari pending timely filing of petition for rehearing, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. D–79. IN RE DISBARMENT OF MOORE. Disbarment entered. [For earlier order herein, see 429 U. S. 937.]

No. D–82. IN RE DISBARMENT OF KOCH. Disbarment entered. [For earlier order herein, see 429 U. S. 954.]

No. D–83. IN RE DISBARMENT OF BRIN. Disbarment entered. [For earlier order herein, see 429 U. S. 954.]

No. D–84. IN RE DISBARMENT OF EDELSTEIN. Disbarment entered. [For earlier order herein, see 429 U. S. 954.]

No. D–85. IN RE DISBARMENT OF ROTHBART. Disbarment entered. [For earlier order herein, see 429 U. S. 954.]

No. D–86. IN RE DISBARMENT OF KUTA. Disbarment entered. [For earlier order herein, see 429 U. S. 955.]

No. D–91. IN RE DISBARMENT OF LEONARD. Disbarment entered. [For earlier order herein, see 429 U. S. 955.]

No. D–92. IN RE DISBARMENT OF ANDERSON. Disbarment entered. [For earlier order herein, see 429 U. S. 956.]

No. 75–1126. TRANS WORLD AIRLINES, INC. *v.* HARDISON ET AL.; and

No. 75–1385. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* HARDISON ET AL. C. A. 8th Cir. [Certiorari granted, 429 U. S. 958.] Motion of Chrysler Corp. for leave to participate in oral argument as *amicus curiae* denied.

No. 75–1771. COMMISSIONER OF INTERNAL REVENUE *v.* STANDARD LIFE & ACCIDENT INSURANCE CO. C. A. 10th Cir. [Certiorari granted, 429 U. S. 814.] Motion of Tax Analysts & Advocates for leave to file a brief as *amicus curiae* denied.

No. 76–63. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* WASHINGTON STATE APPLE ADVERTISING COMMISSION. Appeal from D. C. E. D. N. C. [Probable jurisdiction noted, 429 U. S. 814.] Motion of appellants for leave to file supplemental brief after argument granted.

No. 76–413. UNITED STATES ET AL. *v.* LARIONOFF ET AL. C. A. D. C. Cir. [Certiorari granted, 429 U. S. 997.] Motion to dismiss writ of certiorari denied. Further consideration of alternative request to impose penalty deferred to hearing of case on the merits.

No. 76–5985. STEEL *v.* FINE ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 76–6211. BUCK *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 76–839. FOLEY *v.* CONNELIE, SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 419 F. Supp. 889.

Certiorari Granted

No. 76–864. CITY OF LAFAYETTE, LOUISIANA, ET AL. *v.* LOUISIANA POWER & LIGHT CO. C. A. 5th Cir. Certiorari granted. Reported below: 532 F. 2d 431.

No. 76–944. NIXON *v.* WARNER COMMUNICATIONS, INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 179 U. S. App. D. C. 293, 551 F. 2d 1252.

No. 76–1095. COMMISSIONER OF INTERNAL REVENUE *v.* KOWALSKI ET UX. C. A. 3d Cir. Certiorari granted. Reported below: 544 F. 2d 686.

No. 76–653. ALLIED-GENERAL NUCLEAR SERVICES ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.;

No. 76–762. COMMONWEALTH EDISON CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.;

No. 76–769. WESTINGHOUSE ELECTRIC CORP. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 76–774. BALTIMORE GAS & ELECTRIC CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 539 F. 2d 824.

Certiorari Denied. (See also No. 76–1065, *supra.*)

No. 76–689. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 1230.

No. 76–817. ROBBINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–855. LEGGETT & PLATT, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 655.

No. 76–892. FLOREA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 541 F. 2d 568.

No. 76–902. OLSEN *v.* GOODMAN. Sup. Ct. Fla. Certiorari denied.

No. 76–908. CITIZENS & SOUTHERN NATIONAL BANK *v.* UNITED STATES; and

No. 76–909. CITIZENS & SOUTHERN NATIONAL BANK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 538 F. 2d 1101.

No. 76–924. SAVE OUR INVALUABLE LAND (SOIL), INC., ET AL. *v.* NEEDHAM ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 539.

No. 76–929. OWENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 1386.

No. 76–947. RODEWAY INNS OF AMERICA, INC., ET AL. *v.* FRANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 759.

No. 76–957. WITHINGTON *v.* FEDERAL ENERGY ADMINISTRATION ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–975. WINN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76–987. BAKER, DBA ROSS BAKER TOWING *v.* MARSHALL, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 544 F. 2d 429.

No. 76–990. JACOBSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 21.

No. 76–994. ABDUSH-SHAHID *v.* NEW YORK STATE NARCOTICS ADDICTION CONTROL COMMISSION. Ct. App. N. Y. Certiorari denied.

No. 76–1006. OSTRER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 303.

No. 76–1010. ALLEGHENY COUNTY INSTITUTION DISTRICT, DBA JOHN J. KANE HOSPITAL *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 148.

No. 76–1053. MCCASLIN, DBA TAX MAN *v.* H & R BLOCK, INC. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 1098.

No. 76–1068. COMINS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 370 Mass. —, 356 N. E. 2d 241.

No. 76–1074. DICKERSON *v.* CERMEL-LUFT INSURANCE AGENCY, INC. Sup. Ct. Ohio. Certiorari denied.

No. 76–1089. MARGOLES *v.* JOHNS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 520.

No. 76–1094. OHIO INNS, INC. *v.* NYE, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 673.

No. 76–1097. ARIZONA WHOLESALE SUPPLY CO. *v.* ITULE. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 2d 652.

No. 76–1204. WALLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 538 F. 2d 331.

No. 76–1216. HERNANDEZ *v.* DYE ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–1230. HAYNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 546 F. 2d 861.

No. 76–1235. MITCHOM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 523.

No. 76–5770. LEMUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 222.

No. 76–5773. SCHNEEKLOTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 541 F. 2d 287.

No. 76–5793. LELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1386.

No. 76–5801. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 F. 2d 1083.

No. 76–5862. RICE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 188 Neb. 728, 199 N. W. 2d 480.

No. 76–5888. OLIVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–5890. MONTGOMERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 1172.

No. 76–5911. WEST *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 538 F. 2d 327.

No. 76–5915. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 F. 2d 1255.

No. 76–5979. LIND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 2d 598.

No. 76–5981. HENSON *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 177 U. S. App. D. C. 271, 543 F. 2d 418.

No. 76–5984. HOPKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76–5994. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6010. MURRAY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 40 N. Y. 2d 327, 353 N. E. 2d 605.

No. 76–6011. FEHRENBACH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1168.

No. 76–6030. CLEVENGER *v.* UNITED STATES; and
No. 76–6081. BRAFFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6058. WILSON *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 574.

No. 76–6131. WATSON *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6132. BERNTH *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 196 Neb. 813, 246 N. W. 2d 600.

No. 76–6134. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6136. EMBRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 552.

No. 76–6141. PETTIGREW *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1296.

No. 76–6146. WANDER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 76–6149. IN RE CURLEY. Super. Ct. Pa. Certiorari denied.

No. 76–6153. BROWN *v.* LIBERTY LOAN CORPORATION OF DUVAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 1355.

No. 76–6155. BLOETH *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 2d 600, 387 N. Y. S. 2d 407.

No. 76–6156. WALKER *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 76–6159. NORWOOD *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 74 Wis. 2d 343, 246 N. W. 2d 801.

No. 76–6160. MAXWELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6161. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 76–6217. LAND *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76–6237. HILL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6244. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 954.

No. 76–6245. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 909.

No. 76–6248. FARRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 310.

No. 76–6273. UNDERWOOD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 553 F. 2d 91.

No. 76–6279. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 153.

No. 76–6280. PITCHFORD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 339 So. 2d 601.

No. 76–6319. HOOKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6321. WILEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–1077. UNITED STATES *v.* SECURITY NATIONAL BANK. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 546 F. 2d 492.

No. 76–1087. BENEFICIAL FINANCE COMPANY OF JACKSONVILLE *v.* HARRIS. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 338 So. 2d 196.

No. 76–1132. HERNANDEZ ET AL. *v.* AIR FRANCE. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 545 F. 2d 279.

No. 76–5860. STRATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 540 F. 2d 1083.

No. 76–6201. JUREK *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. Ct. Crim. App. Tex. Without intimating any views on the merits of the questions presented to the United States District Court for the Southern District of Texas in petitioner's pending application for a writ of habeas corpus, the petition for a writ of certiorari is denied. The stay entered on January 17, 1977 [429 U. S. 1057], shall remain in effect until April 4, 1977. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate the judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting).

Rehearing Denied

No. 76–5463. SZYMANSKI *v.* MICHIGAN, 429 U. S. 1075; and

No. 76–6037. REED *v.* DEL CHEMICAL CORP., 429 U. S. 1110. Petitions for rehearing denied.

No. 76–5679. WHITE *v.* ELECTION LAWS OF THE STATE OF COLORADO, 429 U. S. 1076. Motion for leave to file petition for rehearing denied.

MARCH 29, 1977

Dismissal Under Rule 60

No. 76–6309. BARRAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 547 F. 2d 572.

MARCH 30, 1977

Dismissal Under Rule 60

No. 76–1037. RITE AID CORP. ET AL. *v.* BOARD OF PHARMACY OF NEW JERSEY ET AL. Appeal from D. C. N. J. dismissed under this Court's Rule 60. Reported below: 421 F. Supp. 1161.

APRIL 4, 1977

Appeals Dismissed

No. 76–1102. AVCO COMMUNITY DEVELOPERS, INC. *v.* SOUTH COAST REGIONAL COMMISSION ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–1112. RALPH WILLIAMS' NORTHWEST CHRYSLER PLYMOUTH, INC., ET AL. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 87 Wash. 2d 298 and 327, 553 P. 2d 423 and 442.

Certiorari Granted—Vacated and Remanded

No. 75–5800. SONGER, AKA BERRY *v.* FLORIDA. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gardner* v. *Florida, ante,* p. 349. Reported below: 322 So. 2d 481.

No. 76–859. HAZELWOOD CHRONIC & CONVALESCENT HOSPITAL, INC., DBA KEARNEY STREET CONVALESCENT CENTER *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Califano* v. *Sanders, ante,* p. 99. Reported below: 543 F. 2d 703.

Miscellaneous Orders

No. D–90. IN RE DISBARMENT OF BUSHMAN. Disbarment entered. [For earlier order herein, see 429 U. S. 955.]

No. D–100. IN RE DISBARMENT OF OOMS. It is ordered that Owen Jennings Ooms, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–1583. MORRIS ET AL. *v.* GRESSETTE, PRESIDENT PRO TEM, SOUTH CAROLINA SENATE, ET AL. Appeal from D. C. S. C. [Probable jurisdiction noted, 429 U. S. 997.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of appellants granted and 15 minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 76–878. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT *v.* DOE ET AL. Appeal from D. C. Conn.;

No. 76–1033. EVANS, TRUSTEE IN BANKRUPTCY *v.* S. S. KRESGE CO. C. A. 3d Cir.; and

No. 76–1079. LEVC, AKA O'BLAK, ET AL. *v.* CONNORS, TREASURER OF MONTANA, ET AL. Sup. Ct. Mont. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

Certiorari Granted

No. 76–911. ADAMO WRECKING CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Reported below: 545 F. 2d 1.

No. 76–529. MONTANA POWER CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–585. AMERICAN PETROLEUM INSTITUTE ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–594. INDIANA-KENTUCKY ELECTRIC CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–603. ALABAMA POWER CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.;

No. 76–619. UTAH POWER & LIGHT CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 76–620. WESTERN ENERGY SUPPLY & TRANSMISSION ASSOCIATES ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari granted limited to the following questions:

1. Whether regulations promulgated by the Environmental

Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act;

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction. Cases consolidated and a total of one and one-half hours allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 176 U. S. App. D. C. 335, 540 F. 2d 1114.

Certiorari Denied. (See also No. 76–1102, *supra.*)

No. 75–1052. WALLACE, DIRECTOR OF FOOD AND AGRICULTURE OF CALIFORNIA, ET AL. *v.* RATH PACKING CO. C. A. 9th Cir. Certiorari denied. Reported below: 530 F. 2d 1295.

No. 75–1660. GREEN, EXECUTOR, ET AL. *v.* SANTA FE INDUSTRIES, INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 533 F. 2d 1283 and 1309.

No. 76–5. MARSH ET AL. *v.* ARMADA CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 533 F. 2d 978.

No. 76–662. MCMURTREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1387.

No. 76–718. MAKRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 899.

No. 76–748. ABBOTT *v.* THETFORD, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 534 F. 2d 1101.

No. 76–804. CAESAR *v.* MOUNTANOS, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1064.

No. 76–807. GERCEY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 540 F. 2d 536.

No. 76–816. HAYDOCK *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Ventura. Certiorari denied.

No. 76–847. TANAKA *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 712, 538 F. 2d 348.

No. 76–884. MARTIN *v.* ELROD. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 36 Ill. App. 3d 952, 344 N. E. 2d 714.

No. 76–1001. MCCARTHY *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76–1025. JACOBSON ET AL. *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 544 F. 2d 637.

No. 76–1042. BETHLEHEM STEEL CORP. *v.* DEPARTMENT OF ENVIRONMENTAL RESOURCES OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 469 Pa. 578, 367 A. 2d 222.

No. 76–1083. DAVISON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 245 N. W. 2d 321.

No. 76–1106. COPPOLA *v.* FLORIDA. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 318 So. 2d 181.

No. 76–1111. OWENS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 65 Ill. 2d 83, 357 N. E. 2d 465.

No. 76–1119. STRONG *v.* HOLDSWORTH ET UX. C. A. 10th Cir. Certiorari denied. Reported below: 545 F. 2d 687.

No. 76–1128. FAY *v.* RICHTER. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 76–1228. SCHMIEDER *v.* HALL, EXECUTOR. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 768.

No. 76–1244. STOLL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 810.

No. 76–1253. KAPLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–1274. WEST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 545.

No. 76–5668. MARTIN ET AL. *v.* UNITED STATES; and
No. 76–5714. BRENNAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 120.

No. 76–5830. HOSKINS *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 552 P. 2d 342.

No. 76–5853. SKAGGS *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 539 S. W. 2d 583.

No. 76–5867. BURCHFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 922.

No. 76–5919. PORTER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 237 Ga. 580, 229 S. E. 2d 384.

No. 76–5939. ALLEN *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 37 Ill. App. 3d 619, 346 N. E. 2d 486.

No. 76–5940. COGNATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 539 F. 2d 703.

No. 76–5942. LOGAN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 39 Ill. App. 3d 656, 350 N. E. 2d 40.

No. 76–5960. JONES *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1013.

No. 76–5980. GRUBA *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 76–5987. WARLITNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 217 Va. 348, 228 S. E. 2d 698.

No. 76–6003. PONCE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6004. FERRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76–6014. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 1171.

No. 76–6024. REYNOLDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 425.

No. 76–6038. CRUTCHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6039. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 F. 2d 516.

No. 76–6045. LOVELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 76–6056. STARKS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 76–6065. CARREON-HERNANDEZ *v.* BELL, ATTORNEY GENERAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 543 F. 2d 637.

No. 76–6078. EDELSON *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–6118. JESSUP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 420.

No. 76–6162. JACKSON *v.* HOWARD, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1161.

No. 76–6166. TYRRELL *v.* JEFFES, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 76–6172. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6176. HARRISON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76–6178. O'BRIAIN, AKA O'BRIEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6189. NICHOLS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76–6193. BLACKBURN *v.* McKENZIE, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 76–6196. CARTER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 76–6202. TURNER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 339 So. 2d 348.

No. 76–6210. TROMBLEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 76–6223. MICCIO ET AL. *v.* ZONING BOARD OF ADJUSTMENT OF EWING TOWNSHIP ET AL. Super. Ct. N. J. Certiorari denied.

No. 76–6241. MYLES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1171.

No. 76–6316. SAVAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 212.

No. 76–6331. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 613.

No. 76–6347. BETANCOURT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 573.

No. 76–6352. HENDRIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 542 F. 2d 879.

No. 76–6370. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76–6371 LAMAR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 488.

No. 76–370. GARRISON, WARDEN *v.* STRICKLAND. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 538 F. 2d 325.

No. 76–576. BUREAU OF REVENUE OF NEW MEXICO *v.* EASTERN NAVAJO INDUSTRIES, INC. Ct. App. N. M. Motion of Vlassis, Ruzow & Linzer for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 89 N. M. 369, 552 P. 2d 805.

No. 76–617. SIERRA CLUB ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 176 U. S. App. D. C. 335, 540 F. 2d 1114.

No. 76–776. PADERICK, PENITENTIARY SUPERINTENDENT *v.* BOONE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 541 F. 2d 447.

No. 76–6103. BOULWARE *v.* TEXAS; and

No. 76–6199. COLLINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgments insofar as they leave undisturbed the sentences of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: No. 76–6103, 542 S. W. 2d 677.

No. 76–785. WALKER, FORMER GOVERNOR OF ILLINOIS, ET AL. *v.* COLAIZZI ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 542 F. 2d 969.

Rehearing Denied

No. 76–636. BUCKLEY TOWERS CONDOMINIUM, INC., ET AL. *v.* BUCHWALD, ET AL., 429 U. S. 1121;

No. 76–691. THOMPSON *v.* GAFFNEY ET AL., 429 U. S. 1078;

No. 76–701. BRENNAN *v.* UNITED STATES, 429 U. S. 1092;

No. 76–813. BENSON *v.* METRO-GOLDWYN-MAYER, INC., 429 U. S. 1095;

No. 76–828. MARKLE MANUFACTURING CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO–CLC, ET AL., 429 U. S. 1095;

No. 76–899. MCGRAW-EDISON CO. *v.* SOPER ET AL., 429 U. S. 1097;

No. 76–5785. CLARK *v.* MALLEY, WARDEN, *ante*, p. 917;

No. 76–5838. GREENFIELD *v.* TIBBETTS, 429 U. S. 1105;

No. 76–5872. MAUCH *v.* MICHIGAN DEPARTMENT OF CORRECTIONS, 429 U. S. 1106;

No. 76–5986. DONNER *v.* BILL SEIDEL'S DATSUN, INC., ET AL., 429 U. S. 1109; and

No. 76–6072. TROLLEY *v.* UNITED STATES, 429 U. S. 1111. Petitions for rehearing denied.

APRIL 6, 1977

Dismissal Under Rule 60

No. 76–1100. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* HAU ET VIR. Appeal from D. C. N. J. dismissed under this Court's Rule 60.

APRIL 18, 1977

Affirmed on Appeal

No. 76–778. NATIONAL CLASSIFICATION COMMITTEE *v.* UNITED STATES. Affirmed on appeal from D. C. D. C. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 417 F. Supp. 851.

No. 76–1029. SCARNATO ET AL. *v.* PARKER, TREASURER OF LOUISIANA, ET AL. Affirmed on appeal from D. C. M. D. La. Reported below: 415 F. Supp. 272.

No. 76–1069. CANADIAN NATIONAL RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. Reported below: 425 F. Supp. 290

No. 76–6337. TAYLOR ET AL. *v.* HILL, DIRECTOR, DIVISION OF SOCIAL SERVICES, ET AL. Affirmed on appeal from D. C. W. D. N. C. Reported below: 420 F. Supp. 1020.

Appeals Dismissed

No. 76–951. SKAFTE *v.* ROREX, BOULDER COUNTY CLERK. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. *Sugarman* v. *Dougall*, 413 U. S. 634, 649 (1973); *Kramer* v. *Union School District*, 395 U. S. 621, 625 (1969). Reported below: 191 Colo. 399, 553 P. 2d 830.

No. 76–968. POPULAR SCIENCE PUBLISHING CO., INC. *v.* CALIFORNIA BOARD OF EQUALIZATION. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. *National Geographic Society* v. *California Board of Equalization*, *ante*, p. 551.

No. 76–1201. NEW YORK DOCK RAILWAY *v.* DIRECTOR OF FINANCE OF NEW YORK CITY. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 40 N. Y. 2d 1037, 360 N. E. 2d 355.

No. 76–6282. JOHNSON *v.* CRANE ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Reversed on Appeal

No. 76–5606. ACKER *v.* TEXAS. Appeal from County Ct. at Law No. 2, Travis County. Judgment reversed. *Gooding* v. *Wilson*, 405 U. S. 518, 525 (1972). THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent.

Miscellaneous Orders

No. A–787. JUZENAS *v.* CITY OF SOUTHFIELD. Application for stay of execution and enforcement of judgment of the 46th District Court of Michigan, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–801. RICHMOND *v.* ARIZONA. Application for stay of execution and enforcement of sentence of death imposed upon applicant by the Superior Court for the State of Arizona, in and for the County of Pima, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted pending timely filing and disposition of a petition for writ of certiorari in this Court. Reported below: 560 P. 2d 41.

No. D–99. IN RE DISBARMENT OF COOK. It is ordered that G. Bradford Cook, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–1605. NIXON *v.* ADMINISTRATOR OF GENERAL SERVICES ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 429 U. S. 976.] Motion of Public Affairs Associates, Inc., for leave to file a brief as *amicus curiae* denied.

No. 75–1721. UNITED STATES *v.* CHADWICK ET AL. C. A. 1st Cir. [Certiorari granted, 429 U. S. 814.] Motion of respondents for divided argument denied.

No. 75–1707. OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. *v.* HODORY. Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, 429 U. S. 814.] Motion of appellee for leave to file additional material after argument granted.

No. 76–444. NORTHEAST MARINE TERMINAL CO., INC., ET AL. *v.* CAPUTO ET AL.; and

No. 76–454. INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* BLUNDO ET AL. C. A. 2d Cir. [Certiorari granted, 429 U. S. 998.] Motion of International Longshoremen's Assn., AFL–CIO, for leave to participate in oral argument as *amicus curiae* denied.

No. 76–539. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL. C. A. 6th Cir. [Certiorari granted, 429 U. S. 1060.] Motion of respondents for divided argument denied.

No. 76–906. UNITED AIRLINES, INC. *v.* MCMANN. C. A. 4th Cir. [Certiorari granted, 429 U. S. 1090.] Motion of National Retired Teachers Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 76–1184. MALONE, COMMISSIONER OF LABOR AND INDUSTRY OF MINNESOTA *v.* WHITE MOTOR CORP. ET AL. Appeal from C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this matter.

No. 76–5935. DURST ET AL. *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 929.] Motion of Charles G. Berstein, Esquire, to permit Michael Stuart Frisch, Esquire, to present oral argument *pro hac vice*, on behalf of petitioners, granted.

No. 76–6485. MCDONALD *v.* TENNESSEE ET AL. Motion of petitioner to consolidate this case with No. 76–6507 [*McDonald* v. *Tennessee*] denied. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted or Postponed

No. 76–1143. MARSHALL, SECRETARY OF LABOR, ET AL. *v.* BARLOW'S, INC. Appeal from D. C. Idaho. Probable jurisdiction noted. Reported below: 424 F. Supp. 437.

No. 76–1172. FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. Motion of Associated Industries of Massachusetts, Inc., et al. for leave to file a brief as *amici curiae* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. In addition to questions presented by the jurisdictional statement, counsel are directed to brief and argue question of mootness. Reported below: 370 Mass. —, 359 N. E. 2d 1262.

Certiorari Granted

No. 76–695. BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL. *v.* HOROWITZ. C. A. 8th Cir. Certiorari granted. Reported below: 538 F. 2d 1317.

No. 76–1149. CAREY ET AL. *v.* PIPHUS ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 545 F. 2d 30.

No. 76–1171. CARTER, PUBLIC VEHICLE LICENSE COMMISSIONER OF CHICAGO *v.* MILLER. C. A. 7th Cir. Certiorari granted. Reported below: 547 F. 2d 1314.

No. 76–749. PFIZER INC. ET AL. *v.* GOVERNMENT OF INDIA ET AL. C. A. 8th Cir. Certiorari granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 550 F. 2d 396.

No. 76–5761. SIMPSON ET AL. *v.* UNITED STATES; and

No. 76–5796. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 542 F. 2d 1177.

No. 76–1168. ARIZONA ET AL. *v.* WASHINGTON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 546 F. 2d 829.

No. 76–5856. HOLLOWAY ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 260 Ark. 250, 539 S. W. 2d 435.

Certiorari Denied. (See also No. 76–6282, *supra.*)

No. 76–795. TAYLOR *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 76–825. LA DUCA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 417.

No. 76–869. DEFALCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 419.

No. 76–877. RYAN *v.* UNITED STATES; and
No. 76–898. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 782.

No. 76–905. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 1, 543 F. 2d 930.

No. 76–914. C. I. MORTGAGE GROUP ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO (BANKAMERICA REALTY SERVICES, INC., REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 76–943. CANNADY *v.* NORTH CAROLINA WILDLIFE RESOURCES COMMISSION ET AL. Ct. App. N. C. Certiorari denied. Reported below: 30 N. C. App. 247, 226 S. E. 2d 678.

No. 76–961. GANGADEAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 1217.

No. 76–962. MILLER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 32 Md. App. 482, 361 A. 2d 152.

No. 76–967. UCO OIL CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 833.

No. 76–971. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 F. 2d 833.

No. 76–979. ARTHUR G. MCKEE & CO. *v.* G. C. S., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 415.

No. 76–981. CPC INTERNATIONAL, INC., ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 540 F. 2d 1329.

No. 76–982. SLOAN, DBA SAMUEL H. SLOAN & CO. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 535 F. 2d 679.

No. 76–996. POMPONIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76–1008. CAHALAN *v.* WALKER. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 681.

No. 76–1015. HUGHETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–1021. FLAV-O-RICH, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: See 531 F. 2d 358.

No. 76–1022. MILES ET AL. *v.* GUIN, U. S. DISTRICT JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 76–1026. FEDERATED PUBLICATIONS, INC., DBA STATE JOURNAL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 2d 908.

No. 76–1047. GLOBAL INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 542 F. 2d 1178.

No. 76–1061. SANG YON SHIN *v.* IMMIGRATION AND NATURALIZATION SERVICE; and JOON DUCK CHOI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1175.

No. 76–1067. HEMPHILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 544 F. 2d 341.

No. 76–1070. SMALDONE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 544 F. 2d 456.

No. 76–1073. PARRISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76–1082. FARMERS & TRADERS STATE BANK OF MEREDOSIA *v.* MAGILL. C. A. 7th Cir. Certiorari denied. Reported below: 545 F. 2d 583.

No. 76–1086. LOCAL UNION No. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 60, 543 F. 2d 1373.

No. 76–1110. HARMER ET AL. *v.* MOTION PICTURE FILM ENTITLED "THE DEVIL IN MISS JONES" ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1118. JOHNSON, ADMINISTRATRIX, ET AL. *v.* ATLANTIC CITY ELECTRIC CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 417.

No. 76–1123. BROADMOOR APARTMENTS, INC., ET AL. *v.* COLLECTOR OF REVENUE OF LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 336 So. 2d 332.

No. 76–1127. OBURN ET AL. *v.* SHAPP, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 418.

No. 76–1139. SCHANBARGER *v.* DISTRICT ATTORNEY OF RENSSELAER COUNTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 770.

No. 76–1142. HARRIS ET AL. *v.* CAFRITZ MEMORIAL HOSPITAL ET AL. Ct. App. D. C. Certiorari denied. Reported below: 364 A. 2d 135.

No. 76–1145. LEIBOWITZ *v.* SIMINS, COMMISSIONER, DEPARTMENT OF PUBLIC WORKS, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 53 App. Div. 2d 542, 384 N. Y. S. 2d 465.

No. 76–1148. HUGHES *v.* FRANK, COMMISSIONER OF POLICE OF NASSAU COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 300.

No. 76–1154. STEFFRON, INC. *v.* LUSKEY ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: —— Pa. ——, 366 A. 2d 223.

No. 76–1156. REYNOLDS *v.* ESTATE OF REYNOLDS ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 1, 230 S. E. 2d 842.

No. 76–1169. KEYES ET AL. *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 362 A. 2d 729.

No. 76–1170. TERNER *v.* HOPKINS ET AL. C. A. 2d. Cir. Certiorari denied. Reported below: 551 F. 2d 301.

No. 76–1174. FEDERATION OF TELEPHONE WORKERS OF PENNSYLVANIA *v.* BELL TELEPHONE COMPANY OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 415 and 416.

No. 76–1178. JWAYYED *v.* BELL TELEPHONE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied.

No. 76–1180. CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION *v.* HARDIE ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 18 Cal. 3d 371, 556 P. 2d 301.

No. 76–1182. BROWN *v.* IVARANS REDERI A/S. C. A. 3d Cir. Certiorari denied. Reported below: 545 F. 2d 854.

No. 76–1188. UNITED STATES *v.* WHITECLIFF, INC., DBA WHITE CLIFF MANOR. Ct. Cl. Certiorari denied. Reported below: 210 Ct. Cl. 53, 536 F. 2d 347.

No. 76–1213. WOODS *v.* UNITED STATES; and
No. 76–1247. BLAIR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 2d 242.

No. 76–1217. POYNER *v.* LEAR SIEGLER, INC. C. A. 6th Cir. Certiorari denied. Reported below: 542 F. 2d 955.

No. 76–1218. NEUGENT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 340 So. 2d 55.

No. 76–1286. SWEET *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 548 F. 2d 198.

No. 76–1296. TURZITTI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1003.

No. 76–1302. CRAIG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 802.

No. 76–1303. HAYWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–5681. CASPER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 541 F. 2d 1275.

No. 76–5771. LEISS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 364 A. 2d 803.

No. 76–5918. SCULLY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 255.

No. 76–5936. ESTEP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 F. 2d 427.

No. 76–5959. NYBERG *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 64 Ill. 2d 210, 356 N. E. 2d 80.

No. 76–5972. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 546 F. 2d 787.

No. 76–5975. CRONIN *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 76–5993. BLACKBURN *v.* STRALKA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76–6005. HARRELL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 422.

No. 76–6012. HOLMES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6027. CURRY *v.* CALIFANO, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 F. 2d 1174.

No. 76–6042. BROWN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 154.

No. 76–6060. AVALOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 1100.

No. 76–6070. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 544 F. 2d 522.

No. 76–6082. HARBOLT *v.* MCCUNE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 76–6090. LIGGONS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 F. 2d 1118.

No. 76–6091. GIFFORD *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 76–6097. GREENE *v.* HOGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 1171.

No. 76–6105. SAMPLE *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 537 F. 2d 1141.

No. 76–6106. LORENTZOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 423.

No. 76–6112. WAITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1166.

No. 76–6115. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–6116. VELEZ-DIAZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 551 F. 2d 303.

No. 76–6130. MOSBY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 76–6133. DORROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 76–6140. RODRIQUEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 76–6145. RODGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 F. 2d 314.

No. 76–6180. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 1217.

No. 76–6181. SELLMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 178 U. S. App. D. C. 277, 546 F. 2d 1043.

No. 76–6213. PERRY *v.* MULLIGAN, CHIEF PROBATION OFFICER FOR ESSEX COUNTY. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 674.

No. 76–6216. JOHNSON *v.* SUPERINTENDENT, CLIFTON T. PERKINS HOSPITAL CENTER. C. A. 4th Cir. Certiorari denied.

No. 76–6220. BAKER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 428.

No. 76–6222. KINCAID *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 265 Ind. 345, 354 N. E. 2d 199.

No. 76–6229. SAVCHUK *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 547 F. 2d 1167.

No. 76–6230. SIMPSON *v.* BAR ASSOCIATION OF GREATER CLEVELAND. Sup. Ct. Ohio. Certiorari denied. Reported below: 48 Ohio St. 2d 120, 357 N. E. 2d 380.

No. 76–6234. WINEGAR *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 803.

No. 76–6239. FOURNETTE *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 76–6249. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 339 So. 2d 1117.

No. 76–6250. CRAMPTON *v.* GRAY, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 546 F. 2d 424.

No. 76–6257. JETER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 339 So. 2d 91.

No. 76–6270. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 76–6271. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–6272. SWEETWINE *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 549 F. 2d 799.

No. 76–6274. TARKOWSKI *v.* BARTLETT, TRUSTEE, ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 38 Ill. App. 3d 134, 347 N. E. 2d 415.

No. 76–6275. AGNEW *v.* WALKER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–6276. WILSON *v.* SCHMIDT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1170.

No. 76–6278. KRALOWEC *v.* PRINCE GEORGES COUNTY, MARYLAND. Ct. App. Md. Certiorari denied.

No. 76–6288. EDWARDS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 1162.

No. 76–6290. MARTINEZ *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 89 N. M. 729, 557 P. 2d 578.

No. 76–6291. IN RE BARRETO ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 40 N. Y. 2d 1033, 359 N. E. 2d 1369.

No. 76–6292. ROBERTS *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 544 F. 2d 168.

No. 76–6295. VAN MEERBEKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 548 F. 2d 415.

No. 76–6302. RUFF *v.* GRAY. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1169.

No. 76–6306. WHEELER *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 76–6310. HIGGINS *v.* BLOODGOOD ET AL. C. A. 9th Cir. Certiorari denied.

No. 76–6311. LODEN *v.* SYPE, JUDGE, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 76–6320. BLOUNT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 54 App. Div. 2d 718, 387 N. Y. S. 2d 469.

No. 76–6359. BURKS *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 800.

No. 76–6377. MARRUFO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 804.

No. 76–6386. MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 1297.

No. 76–6404. CALHOUN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1169.

No. 76–6419. BOWEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6421. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 310.

No. 76–6427. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 1172.

No. 76–6435. CARTER, AKA BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 1164.

No. 76–6441. PETTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 F. 2d 354.

No. 76–6445. STEVENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 1360.

No. 76–1035. BETHLEHEM STEEL CORP. *v.* QUARLES, ACTING ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE POWELL would grant certiorari. Reported below: 544 F. 2d 657.

No. 76–1195. JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS *v.* JACKSON ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 549 F. 2d 215.

No. 76–6009. EVANS *v.* REED, PENITENTIARY SUPERINTENDENT, ET AL. Sup. Ct. Miss. Certiorari denied for want of a properly presented federal question. Reported below: 342 So. 2d 290.

No. 76–6192. BANKS *v.* GEORGIA; and

No. 76–6354. DOBBS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgments insofar as they leave undisturbed the sentences of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: No. 76–6192, 237 Ga. 325, 227 S. E. 2d 380; No. 76–6354, 236 Ga. 427, 224 S. E. 2d 3.

No. 76–6200. JACKSON ET AL. *v.* JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE POWELL would grant certiorari. Application for stay heretofore granted by MR. JUSTICE BRENNAN on January 25, 1977, is hereby vacated. Reported below: 549 F. 2d 215.

Rehearing Denied

No. 75–353. PIPER ET AL. *v.* CHRIS-CRAFT INDUSTRIES, INC., *ante*, p. 1;

No. 75–354. FIRST BOSTON CORP. *v.* CHRIS-CRAFT INDUSTRIES, INC., *ante*, p. 1;

No. 75–355. BANGOR PUNTA CORP. *v.* CHRIS-CRAFT INDUSTRIES, INC., *ante*, p. 1;

No. 75–963. KILGORE *v.* UNITED STATES, *ante*, p. 905;

No. 75–6944. SCHWARTZ *v.* UNITED STATES, *ante*, p. 906;

No. 76–29. COMPLETE AUTO TRANSIT, INC. *v.* BRADY, CHAIRMAN, MISSISSIPPI TAX COMMISSION, *ante*, p. 274;

No. 76–554. TULARE LAKE CANAL CO. ET AL. *v.* UNITED STATES, 429 U. S. 1121;

No. 76–555. SALYER LAND CO. *v.* UNITED STATES, 429 U. S. 1121;

No. 76–590. SHUEY *v.* UNITED STATES, 429 U. S. 1092;

No. 76–712. STEWART *v.* UNITED STATES ET AL., 429 U. S. 1081;

No. 76–763. CAMELIA BUILDERS, INC., ET AL. *v.* FIDELITY MORTGAGE INVESTORS, 429 U. S. 1093;

No. 76–803. VESCO & CO., INC. *v.* INTERNATIONAL CONTROLS CORP., 429 U. S. 1088;

No. 76–868. JAMES *v.* ILLINOIS, 429 U. S. 1082;

No. 76–980. IN RE KRAFT, *ante*, p. 915;

No. 76–1019. AFFLERBACH *v.* UNITED STATES, 429 U. S. 1098;

No. 76–5792. HAUGEN *v.* BRYAN, *ante*, p. 909; and

No. 76–5883. ROOTS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, *ante*, p. 934. Petitions for rehearing denied.

APRIL 25, 1977

Appeals Dismissed

No. 76–893. SLOAN, DBA SAMUEL H. SLOAN & CO. *v.* SHEARSON, HAMMILL & CO., INC. Appeal from Ct. App. N. Y. dis-

missed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 40 N. Y. 2d 844, — N. E. 2d —.

No. 76–1236. CHRISTENSEN *v.* MOORE ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 76–6047. FELDMAN ET AL. *v.* WEYMOUTH TOWNSHIP ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 71 N. J. 249, 364 A. 2d 1016.

No. 76–6332. WATKINS *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 340 So. 2d 235.

No. 76–1030. MINNESOTA *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 543 F. 2d 1198.

MR. JUSTICE STEVENS, with whom MR. JUSTICE MARSHALL and MR. JUSTICE REHNQUIST join, dissenting.

In this case, the Court of Appeals held that dredging by the Army Corps of Engineers is exempt from state water-pollution regulations. 543 F. 2d 1198 (CA8 1976). The Court today refuses to review this ruling despite the fact that the case is here on appeal, and may well be within our mandatory jurisdiction.[1] The case deserves plenary review

[1] Our mandatory jurisdiction includes cases in which a court of appeals holds a state statute "invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." 28 U. S. C. § 1254 (2). The Secretary

because of its practical importance and because of the likelihood that error has been committed.

The general rule, of course, is that federal agencies are immune from state regulation, but this immunity may be waived by Congress. See *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200. It appears that Congress has made such a waiver in § 313 of the Federal Water Pollution Control Act, as added, 86 Stat. 875, 33 U. S. C. § 1323 (1970 ed., Supp. V). Section 313 provides, in no uncertain terms, that:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall comply with Federal, State, interstate, and local requirements . . . ."

Congress was cautious indeed in allowing exceptions, as shown by the remainder of § 313. Federal agencies may be exempted only by the President himself, and only if he finds the exemption to be in the "paramount interest of the United States." Even then, the exemption lasts only one year unless renewed by the President, and he must report each exemption

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of the Army concedes that "[b]y holding that the federal statute did not waive the traditional immunity of the Corps of Engineers from state regulation, the court implicitly held that the purported reach of state laws over the Corps' dredging activities was invalid under the Supremacy Clause . . . ." Motion to Dismiss or Affirm 5. In *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, the Court of Appeals, 234 F. 2d 380, had ruled that, as applied, a state taxing statute invaded the Federal Government's immunity from state taxation. This Court postponed the question of appellate jurisdiction to the hearing on the merits, but then held without explanation that an appeal was proper. 355 U. S., at 492. A similar result should apply to a holding that a state statute invaded the Federal Government's immunity from unconsented state regulation. It is arguable, of course, that our mandatory appellate jurisdiction is defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps, but we clearly have power to review the case on writ of certiorari.

to Congress "together with his reason for granting such exemption."

Despite the evident intent of Congress to allow even temporary exemptions only under extraordinary circumstances, the Court of Appeals found an implied, permanent exemption in § 404 of the Act, 86 Stat. 884, 33 U. S. C. § 1344 (1970 ed., Supp. V).[2] 543 F. 2d, at 1202. Section 404 simply provides that dredging permits are issued by the Army Corps of Engineers, rather than the Environmental Protection Agency. It says nothing about any exemption from state water-pollution regulation. Indeed, § 404 does not distinguish between dredging by the Corps and dredging by private industry; private dredgers are concededly subject to state pollution require-

[2] Section 404 states:

"(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403 (c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

"(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection." 86 Stat. 884.

ments (Motion to Dismiss or Affirm 9, and n. 10); and Congress expected that "the disposal activities of private dredgers and the Corps of Engineers will be treated similarly." S. Conf. Rep. No. 92–1236, p. 142 (1972); see also H. R. Rep. No. 92–911, p. 130 (1972).

In *State Water Resources Control Bd.*, the Court emphasized that "[f]ederal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." 426 U. S., at 211. Perhaps further investigation will disclose that the congressional authorization here is not so "clear and unambiguous" as it now appears to be. Even giving all benefit of the doubt to the Court of Appeals, however, the correctness of its holding is far from apparent.

This case has more than theoretical importance. According to the complaint, the Corps dredges some two million cubic yards of sediment from the Mississippi River alone, and deposits about half that amount in Minnesota. App. A–4. These activities have allegedly caused "severe degradation of the quality of the waters of [that] state." *Id.*, at A–2. Other States, too, are concerned—briefs of *amici curiae* urging reversal have been filed on behalf of California, Hawaii, Idaho, Missouri, Washington, and Wisconsin.

I would order the case set for oral argument, postponing until then the issue whether the case should be taken on appeal or by writ of certiorari.

No. 76–1226. SICILIANO ET AL. *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 40 N. Y. 2d 996, 359 N. E. 2d 700.

No. 76–5933. FILMON *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 336 So. 2d 586.

Certiorari Granted—Reversed and Remanded. (See No. 76–1036, *ante*, p. 723.)

Miscellaneous Orders

No. A–812 (76–5415). GILBERT *v.* UNITED STATES, *ante*, p. 902. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–101. IN RE DISBARMENT OF WALKER. It is ordered that John E. Walker, of Lansing, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–102. IN RE DISBARMENT OF PAPPAS. It is ordered that Peter Victor Pappas, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–103. IN RE DISBARMENT OF CLAY. It is ordered that Gerald R. Clay, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 75–1181. BATTERTON, SECRETARY, DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES OF MARYLAND, ET AL. *v.* FRANCIS ET AL. C. A. 4th Cir. [Certiorari granted, 429 U. S. 939.] Motion of respondents for leave to file supplemental brief granted.

No. 76–422. DOTHARD, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ALABAMA, ET AL. *v.* RAWLINSON ET AL. Appeal from D. C. M. D. Ala. [Probable jurisdiction noted, 429 U. S. 976.] Motion of the Solicitor General for leave to file a brief as *amicus curiae* denied.

No. 76–1420. STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA ET AL. *v.* ARTHUR ANDERSEN & CO. ET AL. C. A. 2d Cir. Motion to expedite consideration of petition for writ of certiorari denied.

No. 76–5187. LEE *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 429 U. S. 1037.] Motion of Thomas Sanabria for leave to file a brief as *amicus curiae* denied.

Probable Jurisdiction Postponed

No. 76–1200. CRIST, WARDEN, ET AL. *v.* CLINE ET AL. Appeal from C. A. 9th Cir. Motion of appellee Merrel Cline for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 546 F. 2d 1336.

Certiorari Granted

No. 76–1121. AMERICAN BROADCASTING COMPANIES, INC., ET AL. *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL.;

No. 76–1153. ASSOCIATION OF MOTION PICTURE & TELEVISION PRODUCERS, INC. *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL.; and

No. 76–1162. NATIONAL LABOR RELATIONS BOARD *v.* WRITERS GUILD OF AMERICA, WEST, INC., ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one and one-half hours allotted for oral argument. Reported below: 547 F. 2d 159.

Certiorari Denied. (See also Nos. 76–893, 76–1236, 76–6047, 76–6332, 76–1030, and 76–5933, *supra.*)

No. 75–5867. COOK *v.* PARKINSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 120.

No. 76–814. CAMERON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 543 F. 2d 1002.

No. 76–956. MISSISSIPPI GAY ALLIANCE ET AL. *v.* GOUDELOCK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1073.

No. 76–886. UMENTUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 987.

No. 76–937. CHAFFIN ET AL. *v.* MCDONALD ET UX. Ct. App. Tenn. Certiorari denied.

No. 76–1012. MANSFIELD *v.* SMALL CLAIMS COURT, LOS ANGELES JUDICIAL DISTRICT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 76–1018. FORT MOJAVE TRIBE *v.* COUNTY OF SAN BERNARDINO. C. A. 9th Cir. Certiorari denied. Reported below: 543 F. 2d 1253.

No. 76–1072. VALERIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–1080. DAIGLE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 220 Kan. 639, 556 P. 2d 400.

No. 76–1088. FEDERAL TRADE COMMISSION *v.* BENEFICIAL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 542 F. 2d 611.

No. 76–1090. COOK *v.* UNITED STATES; and
No. 76–1267. CRAVERO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 406.

No. 76–1096. LANGELLA *v.* COMMISSIONER OF CORRECTIONS OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 545 F. 2d 818.

No. 76–1098. MARATHON OIL CO. *v.* FEDERAL ENERGY ADMINISTRATION ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 547 F. 2d 1140.

No. 76–1140. YOUNG ET AL. *v.* MIDLAND INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied.

No. 76–1207. WARD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 37 Ill. App. 3d 960, 347 N. E. 2d 381.

No. 76–1222. NEW PITTSBURGH COURIER PUBLISHING CO. *v.* JONES, RECEIVER. Sup. Ct. Pa. Certiorari denied. Reported below: 469 Pa. 157, 364 A. 2d 1315.

No. 76–1224. A. STUCKI CO. *v.* RAILROAD DYNAMICS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1158.

No. 76–1229. KELLNER *v.* KARNES CITY INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 279.

No. 76–1232. CARTER ET AL. *v.* HAMLIN HOSPITAL DISTRICT ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 538 S. W. 2d 671.

No. 76–1233. SUPER ATHLETICS CORP. ET AL. *v.* UNIVERSAL ATHLETIC SALES CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 530.

No. 76–1237. FRIEDMAN ET AL. *v.* BERGER, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 547 F. 2d 724.

No. 76–1241. FLORIDA *v.* NIDIFFER. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 908.

No. 76–1256. PEAK ET AL. *v.* ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 340 So. 2d 796.

No. 76–1272. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 782, AFL–CIO, ET AL. *v.* OLSON, CITY MANAGER OF SALINA, KANSAS. C. A. 10th Cir. Certiorari denied.

No. 76–1282. FULTON *v.* HECHT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 540.

No. 76–1336. BLITZSTEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 804.

No. 76–1301. DUBUQUE COMMUNICATIONS CORP. *v.* AMERICAN BROADCASTING COMPANIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1170.

No. 76–1342. GUSAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 F. 2d 15.

No. 76–1344. MUHAMMAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 517.

No. 76–5950. FOWLER *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 76–5990. KNIGHT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 542 F. 2d 1163.

No. 76–6017. PACHECO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 546 F. 2d 448.

No. 76–6019. JUAREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 568 F. 2d 120.

No. 76–6044. LYNOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 657.

No. 76–6048. CAMPBELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 542 F. 2d 548.

No. 76–6151. CASSELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 F. 2d 279.

No. 76–6152. BOORD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 76–6154. BEGLEY *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. Reported below: 544 F. 2d 1345.

No. 76–6158. HORN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 76–6169. MELICKIAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 547 F. 2d 416.

No. 76–6195. NOLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–6208. CHANDLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 546 F. 2d 415.

No. 76–6312. MCMAHAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 548 F. 2d 712.

No. 76–6330. RODRIGUEZ *v.* AARON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 76–6339. SMITH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 339 So. 2d 829.

No. 76–6342. BURAS *v.* COATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 76–6344. NELSON *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 167.

No. 76–6345. CLARK *v.* RODRIGUEZ ET AL. C. A. 10th Cir. Certiorari denied.

No. 76–6349. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certeriorari denied.

No. 76–6351. MANSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 61 Cal. App. 3d 102, 132 Cal. Rptr. 265.

No. 76–6356. VICTORS, AKA VITORATOS *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 76–6358. FRANKEL *v.* AMERICAN EXPORT-ISBRANDTSEN LINES, INC. C. A. 2d Cir. Certiorari denied.

No. 76–6360. WATSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 114 Ariz. 1, 559 P. 2d 121.

No. 76–6362. NUSS, TRUSTEE *v.* LOONEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 545 F. 2d 916.

No. 76–6437. LARICHE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 F. 2d 1088.

No. 76–6438. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 F. 2d 797.

No. 76–6450. CRAFT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 547 F. 2d 1169.

No. 76–6460. SPICER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 F. 2d 1228.

No. 76–6465. FOLKERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6484. GONZALEZ *v.* SOUTHERN METHODIST UNIVERSITY. C. A. 5th Cir. Certiorari denied. Reported below: 536 F. 2d 1071.

No. 76–1075. LEBEOUF BROS. TOWING CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion of Lawrence K. Benson et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 537 F. 2d 149.

No. 76–1208. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* PRESSLEY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 540 F. 2d 818.

No. 76–6294. HILL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: 339 So. 2d 1382.

No. 76–6305. WHITE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and vacate judgment insofar as it leaves undisturbed the sentence of death. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting); *id.*, at 231 (MARSHALL, J., dissenting). Reported below: 543 S. W. 2d 104.

Rehearing Denied

No. 75–1198. NOLDE BROTHERS, INC. *v.* LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL–CIO, *ante*, p. 243;

No. 76–1054. CATANZARO *v.* CENTRAL GULF STEAMSHIP CORP. ET AL., *ante*, p. 916; and

No. 76–5881. MORALES *v.* TURMAN ET AL., *ante*, p. 322. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit from October 10, 1977, to October 14, 1977, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

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2. *Death sentence—Imposition on basis of confidential presentence investigation report.*—Florida Supreme Court judgment affirming petitioner convicted murderer's death sentence without discussing petitioner's contention that sentencing court had erred in considering presentence investigation report, including confidential portion not disclosed to counsel, in imposing sentence, and without reviewing such confidential portion, is vacated and case is remanded. Gardner v. Florida, p. 349.

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3. *Obscenity prosecution—Retroactivity of new standards for determining "hard core" pornography.*—Due Process Clause of Fifth Amendment precludes retroactive application to petitioners (who were charged with transporting obscene materials in violation of a federal statute) of new standards announced in *Miller* v. *California*, 413 U. S. 15, 29, for "isolating 'hard core' pornography from expression protected by the First Amendment," to extent that those standards may impose criminal liability for conduct not punishable under standards announced in *Memoirs* v. *Massachusetts*, 383 U. S. 413. Marks v. United States, p. 188.

4. *State use tax—Out-of-state seller's collection liability—Nexus with State.*—California's imposition of use-tax-collection liability on appellant out-of-state seller's mail-order operation does not violate Due Process Clause of Fourteenth Amendment, since appellant's continuous presence in California in two offices that solicit advertising for its magazine but perform no activities related to mail-order business provides a sufficient nexus between appellant and State to justify such imposition as applied to appellant. National Geographic Soc. v. California Equalization Bd., p. 551.

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2. *Fifth Amendment—Exclusion from Act distributing federal funds to Indians.*—Exclusion of Kansas Delawares from distribution under Act providing for distribution of federal funds only to Cherokee and Absentee Delawares pursuant to an award by Indian Claims Commission to redress breach by United States of an 1854 treaty with Delaware Tribe, does not offend Due Process Clause of Fifth Amendment, since on record such exclusion was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Delaware Tribal Business Comm. v. Weeks, p. 73.

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4. *Grand jury discrimination.*—Based on all facts that bear on issue of discrimination in selection of county grand jury that indicted respondent Mexican-American, such as statistical disparities (county population was 79% Mexican-American, but, over an 11-year period, only 39% of those summoned for grand jury service were Mexican-American), method of jury selection, and any other relevant testimony as to manner in which selection process was implemented, proof offered by respondent was sufficient to demonstrate a prima facie case of intentional discrimination in grand jury selection, and State failed to rebut such presumption by competent evidence. Castaneda v. Partida, p. 482.

5. *Illegitimate children—Inheritance only from mothers.*—Section 12 of Illinois Probate Code, which allows illegitimate children to inherit by intestate succession only from their mothers (though under Illinois law legitimate children may inherit by intestate succession from both their mothers and fathers), violates Equal Protection Clause of Fourteenth Amendment. Trimble v. Gordon, p. 762.

6. *Indians—Murder committed on reservation.*—Respondent Indians, who were convicted of first-degree murder of a non-Indian on their reservation under felony-murder provisions of federal enclave murder statute, 18 U. S. C. § 1111, as made applicable to Indians by Major Crimes Act, were not deprived of equal protection of laws, even though a non-Indian charged with same crime would have been subject to prosecution under state law, under which premeditation and deliberation would have had to be proved, whereas no such elements were required under felony-murder provisions of § 1111. United States v. Antelope, p. 641.

7. *Old-age benefits under Social Security Act—Retroactivity of amendment eliminating sex distinction.*—Failure to make retroactive 1972 amendment to Social Security Act eliminating distinction whereby female wage earners were given more favorable treatment than male wage earners with respect to computing old-age benefits, does not constitute discrimination on basis of date of birth. Congress may replace one constitutional

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8. *Old-age benefits under Social Security Act—Sex discrimination.*—Statutory scheme of Social Security Act itself, and legislative history of former § 215 (b) (3) of Act whereby female wage earners were given more favorable treatment than male wage earners with respect to computing old-age benefits, demonstrate that statute was deliberately enacted to "redres[s] our society's longstanding disparate treatment of women," and was not "the accidental byproduct of a traditional way of thinking about women." Statute operated directly to compensate women for past economic discrimination by allowing them to eliminate additional low-earning years from calculation of their retirement benefits, and in no way penalized women wage earners. Califano v. Webster, p. 313.

9. *Separate voter approval requirements for county charter.*—Challenged New York constitutional and statutory provisions, whereby a proposed county charter submitted by referendum to voters for approval is adopted only if a majority of both voting city and voting noncity dwellers approve, do not violate Equal Protection Clause of Fourteenth Amendment. Lockport v. Citizens for Community Action, p. 259.

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1. *Freedom of speech—Requiring display of state motto on license plates.*—State may not constitutionally require an individual to participate in dissemination of an ideological message by displaying it on his private property in a manner and for express purpose that it be observed and read by public. New Hampshire's statute requiring noncommercial motor vehicles to bear license plates embossed with state motto, "Live Free or Die," by forcing an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for advocating public adherence to an ideological point of view he finds unacceptable, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." Wooley v. Maynard, p. 705.

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2. *Freedom of the press—Injunction against publishing juvenile delinquent's name or photograph.*—A state court's pretrial order enjoining news media, which had been allowed without objection to be present at 11-year-old boy's detention hearing, from publishing boy's name or photograph in connection with pending juvenile proceeding charging him with delinquency by second-degree murder, abridges freedom of press in violation of First and Fourteenth Amendments. Oklahoma Publishing Co. v. District Court, p. 308.

VIII. Seventh Amendment.

Right to jury trial—Violations of Occupational Safety and Health Act of 1970.—Seventh Amendment does not prevent Congress from assigning to an administrative agency task of adjudicating violations of OSHA. When Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating Seventh Amendment's injunction that jury trial is to be "preserved" in suits at common law. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, p. 442.

IX. Sixth Amendment.

1. *Right to counsel.*—Where, after respondent had been arrested, arraigned, and committed to jail, police officer obtained incriminating statements from him during automobile trip back to city in which alleged crime had been committed, despite his lawyers' advice not to make any statements and police officers' agreement not to question him during trip, respondent was deprived of his constitutional right to assistance of counsel. Brewer v. Williams, p. 387.

2. *Waiver of right to counsel.*—Circumstances of record provide, when viewed in light of respondent's assertions of his right to counsel, no reasonable basis for finding that respondent waived his right to assistance of counsel, record falling far short of sustaining State's burden to prove "an intentional relinquishment or abandonment of a known right or privilege." Brewer v. Williams, p. 387.

X. Suspension Clause.

Privilege of writ of habeas corpus—District of Columbia Code.—Section 23–110 (g) of D. C. Code Ann. (which provides that an application for a writ of habeas corpus on behalf of a prisoner authorized to apply for collateral relief by motion in District of Columbia Superior Court pursuant to statute "shall not be entertained by the Superior Court or by a Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention") does not suspend privi-

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lege of writ of habeas corpus in violation of Art. I, § 9, cl. 2, of Constitution. Swain v. Pressley, p. 372.

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1. *Action seeking relief against enforcement of state statutes—Federal District Court's jurisdiction.*—Principles of equitable restraint enunciated in *Younger* v. *Harris,* 401 U. S. 37, do not preclude Federal District Court from exercising jurisdiction over action by appellee husband and wife seeking injunctive and declaratory relief against enforcement of New Hampshire statutes requiring noncommercial motor vehicles to bear license plates embossed with state motto, "Live Free or Die," and making it a misdemeanor to obscure motto, where appellee husband had been convicted under misdemeanor statute and there is a threat of repeated prosecutions in future against both appellees. Wooley v. Maynard, p. 705.

2. *Federal-court interference with State's contempt process.*—Federal District Court erred in enjoining enforcement of New York contempt procedures on federal constitutional grounds. Principles of federalism and comity enunciated in *Younger* v. *Harris,* 401 U. S. 37 and *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592, apply to a case in which State's contempt process is involved. Whether disobedience of a court-sanctioned subpoena,

FEDERAL-STATE RELATIONS—Continued.
and resulting process leading to a finding of contempt of court, as was involved here, is labeled civil, quasi-criminal, or criminal, salient fact is that federal-court interference with State's contempt process is "an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding." Moreover, such interference with contempt process not only "unduly interferes with the [State's] legitimate activities," but also "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'" Juidice v. Vail, p. 327.

3. *Labor union member's tort action against union—Pre-emption by National Labor Relations Act.*—NLRA does not pre-empt tort action by labor union member and officer against union and union officials for intentional infliction of emotional distress allegedly caused by their "outrageous conduct" toward him because of a sharp disagreement between him and union officials over various internal union policies. Farmer v. Carpenters, p. 290.

4. *State regulation of flour packaging—Federal Packaging and Labeling Act as controlling.*—Although Federal Packaging and Labeling Act in 15 U. S. C. § 1461 (which provides that Act supersedes any state laws that are "less stringent than or require information different from" requirements of FPLA or its implementing regulations) does not pre-empt § 12211 of California Business and Professions Code, which regulates net-weight labeling of packages of commodities, as implemented by Art. 5 of California Administrative Code, since it appears that California law is not "less stringent than" and does not "require information different from" FPLA and implementing regulations, nevertheless, with regard to respondent millers' flour, enforcement of § 12211, as implemented by Art. 5, would prevent "the accomplishment and execution of the full purposes and objectives of Congress" in passing FPLA, an impermissible result under Constitution, and hence state law must yield to federal. Jones v. Rath Packing Co., p. 519.

5. *State regulation of meat packaging—Pre-emption by Federal Meat Inspection Act.*—With respect to respondent packing company's packaged bacon, § 12211 of California Business and Professions Code, which regulates net-weight labeling of packages of commodities, and Art. 5 of California Administrative Code, which implements § 12211, are pre-empted by Federal Meat Inspection Act. Since California makes no allowance for loss of weight resulting from moisture loss during course of good distribution practice, state law's requirement—that label accurately state net weight, with implicit allowance only for reasonable manufacturing variations—is "different than" federal requirement, which permits manufacturing deviations *and* variations caused by moisture loss during good distribution practice. Jones v. Rath Packing Co., p. 519.

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6. *State regulation of waste disposal—Pre-emption—Intervening federal legislation.*—New Jersey Supreme Court's judgment that New Jersey statute prohibiting bringing into State of solid or liquid waste originating or collected elsewhere was not pre-empted by Federal Solid Waste Disposal Act of 1965, and was not unconstitutional as a discrimination against or an undue burden on interstate commerce, is vacated and case is remanded for reconsideration of pre-emption question in light of subsequently enacted Federal Resource Conservation and Recovery Act of 1976. Philadelphia v. New Jersey, p. 141.

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1. *Effluent limitations—Judicial review—Court of appeals.*—Section 509 (b)(1)(E) of Act unambiguously authorizes court of appeals review of Environmental Protection Agency's action promulgating an effluent limitation for existing point sources under § 301, and reference in § 509 (b)(1)(E) to § 301 was not intended only to provide for review of grant or denial of an individual variance under § 301 (c). Since effluent limitations are typically promulgated in same proceeding as new-source standards under § 306, there is no doubt that Congress intended review of two sets of regulations to be had in same forum. E. I. du Pont de Nemours & Co. v. Train, p. 112.

2. *Environmental Protection Agency's authority—Limitation of discharges—Industrywide regulations.*—EPA has authority under § 301 of Act to limit discharges of pollutants by existing plants through industrywide regulations setting forth uniform effluent limitations for both 1977 and 1983, provided some allowance is made for variations in individual plants. E. I. du Pont de Nemours & Co. v. Train, p. 112.

3. *Variances for individual plants.*—Variances for individual plants unable to comply with new-source standards issued under § 306 of Act are not authorized. Congress clearly intended regulations under § 306 to be absolute prohibitions, as is indicated by use of word "standards" in § 306, as well as by description of preferred standard as one "permitting *no* discharge of pollutants." E. I. du Pont de Nemours & Co. v. Train, p. 112.

FELONY MURDER. See **Constitutional Law**, V, 6.

FEMALE WAGE EARNERS. See **Constitutional Law**, V, 3.

FIDUCIARY DUTY OF MAJORITY STOCKHOLDERS. See **Securities Exchange Act of 1934**, 2–4.

FIFTEENTH AMENDMENT. See **Voting Rights Act of 1965.**

FIFTH AMENDMENT. See **Army and Air Force Vitalization and Retirement Equalization Act of 1948**; **Constitutional Law**, III, 3; V, 1–3, 6–8; VI.

FINDINGS OF FACT. See **Habeas Corpus**, 2.

FIRST AMENDMENT. See **Constitutional Law**, VII.

FIRST-DEGREE MURDER. See **Constitutional Law**, III, 2.

FLORIDA. See **Constitutional Law**, III, 1; IV.

FLOUR PACKAGING REQUIREMENTS. See **Federal-State Relations**, 4.

FOURTEENTH AMENDMENT. See **Constitutional Law**, III, 1, 4; V, 4, 5, 9; VII, 2; IX; **Voting Rights Act of 1965.**

FRAUD. See **Securities Exchange Act of 1934**, 2–4.

FREEDOM OF SPEECH. See **Constitutional Law**, VII, 1.

FREEDOM OF THE PRESS. See **Constitutional Law**, VII, 2.

GENDER-BASED DISCRIMINATION. See **Constitutional Law**, V, 3, 7, 8.

"GOVERNING MAJORITY" THEORY AS TO GRAND JURY DISCRIMINATION. See **Constitutional Law**, V, 4.

GOVERNMENT APPEALS. See **Constitutional Law**, VI.

GRAND JURIES. See **Constitutional Law**, V, 4.

GRIEVANCE-ARBITRATION MACHINERY. See **Labor.**

HABEAS CORPUS. See also **Constitutional Law**, X.

1. *District of Columbia Code—Prohibition against postconviction application.*—Section 23–110 (g) of D. C. Code Ann. (which provides that an application for a writ of habeas corpus on behalf of a prisoner authorized to apply for collateral relief by motion in District of Columbia Superior Court pursuant to statute "shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief") prohibits Federal District Court for District of Columbia from entertaining respondent's post-conviction application for a writ of habeas corpus. Swain v. Pressley, p. 372.

2. *Federal court—Factual determinations—Consistency with state-court findings.*—In respondent's petition for habeas corpus in Federal District Court after Iowa Supreme Court had affirmed his murder conviction over his objections to admission of certain evidence allegedly obtained in violation of his right to counsel, District Court correctly applied 28 U. S. C. § 2254 (d) (which provides that, subject to certain exceptions, federal habeas corpus courts shall accept as correct factual determinations made by state courts) in its resolution of disputed evidentiary facts, where it appears that it made no findings of fact in conflict with those of Iowa

HABEAS CORPUS—Continued.
courts, and that its additional findings of fact based upon its examination of state-court record were conscientiously and carefully explained and were approved by Court of Appeals as being supported by record. Brewer v. Williams, p. 387.

HARD-CORE PORNOGRAPHY. See **Constitutional Law, III, 3.**

HASIDIC JEWS. See **Voting Rights Act of 1965.**

HEALTH, EDUCATION, AND WELFARE SECRETARY. See **Administrative Procedure Act; Social Security Act.**

HIRING HALLS. See **Procedure.**

ILLEGITIMATE CHILDREN. See **Constitutional Law, V, 1, 5.**

ILLINOIS. See **Constitutional Law, V, 5.**

IMMIGRATION AND NATIONALITY ACT OF 1952. See **Constitutional Law, V, 1.**

IMPLIED CAUSES OF ACTION. See **Securities Exchange Act of 1934, 1, 5, 6.**

INCOME TAXES. See **Internal Revenue Code.**

INDIANS. See also **Constitutional Law, V, 2, 6.**

Diminution of Indian reservation boundaries.—Both language and legislative history of Acts of 1904, 1907, and 1910, whereby land in certain counties in South Dakota located within boundaries of Rosebud Sioux Reservation as defined in an 1889 Treaty was required to be ceded by Reservation Indians to Government for sale to settlers under homestead and townsite laws with proceeds to be credited to Indians only as received or, with respect to certain parcels, for transfer to South Dakota for school use, clearly evidence a congressional intent to diminish boundaries of Reservation. Rosebud Sioux Tribe v. Kneip, p. 584.

INDIAN TREATIES. See **Constitutional Law, V, 2; Indians; Justiciability.**

INDUSTRYWIDE REGULATION OF WATER POLLUTION. See **Federal Water Pollution Control Act.**

INHERITANCE BY ILLEGITIMATE CHILDREN. See **Constitutional Law, V, 5.**

INJUNCTIONS. See **Constitutional Law, VII, 2; Federal-State Relations, 1, 2; Securities Exchange Act of 1934, 1, 5, 6; Standing to Sue.**

INMATE ACCESS TO COURTS. See **Constitutional Law, I.**

INSURANCE COMPANIES. See **Internal Revenue Code.**

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. See **Federal-State Relations**, 3; **Procedure.**

INTERNAL REVENUE CODE.

1. *Accident and health insurance policies—Attribution of unearned premium reserves for federal tax purposes.*—Since taxpayer insurance companies, pursuant to reinsurance treaties, neither held unearned premium dollars from accident and health policies nor set up corresponding unearned premium reserves, and since that treatment was in accord with customary practice as policed by state regulatory authorities, § 801 (c) (2) of Code (which defines "total reserves" as "unearned premiums, and unpaid losses (whether or not ascertained), not included in life insurance reserves," for purposes of § 801 (a), under which an insurance company is considered a life insurance company qualified for preferential tax treatment if its life insurance reserves constitute more than 50% of its "total reserves") does not permit attribution to taxpayers of reserves held by other parties to reinsurance treaties for purposes of applying 50% test of § 801 (a). United States v. Consumer Life Ins. Co., p. 725.

2. *Accident and health insurance policies—Attribution of unearned premium reserves for federal tax purposes.*—Attribution to taxpayer insurance companies of unearned premium reserves for accident and health policies is not required under § 801 (c) (3) of Code, counting in total reserves "all other insurance reserves required by law" for purposes of § 801 (a), under which an insurance company is considered a life insurance company qualified for preferential tax treatment if its life insurance reserves constitute more than 50% of its "total reserves." United States v. Consumer Life Ins. Co., p. 725.

INTERSTATE COMMERCE. See **Constitutional Law**, II, 1.

INTERVENING LEGISLATION. See **Federal-State Relations**, 6.

INVIDIOUS DISCRIMINATION. See **Constitutional Law**, V, 3, 4, 9.

JEHOVAH'S WITNESSES. See **Constitutional Law**, VII, 1.

JUDGMENT DEBTORS. See **Standing to Sue.**

JUDGMENTS OF ACQUITTAL. See **Constitutional Law**, VI.

JUDICIAL REVIEW. See **Administrative Procedure Act**; **Federal Water Pollution Control Act**; **Justiciability**; **Social Security Act.**

JURISDICTION. See also **Administrative Procedure Act**; **Federal-State Relations**, 1, 3; **Habeas Corpus**, 1; **Removal.**

1. *Three-judge District Court—Action challenging overcrowding in state prisons.*—A three-judge District Court was not required under 28 U. S. C. § 2281 to hear and determine an action challenging constitutionality of

JURISDICTION—Continued.

overcrowding in Florida's prisons, and a single District Judge properly exercised jurisdiction. Costello v. Wainwright, p. 325.

2. *Three-judge District Court—Action challenging unwritten practices of state juvenile institutions.*—A three-judge District Court was not required under 28 U. S. C. § 2281 to hear and determine an action challenging constitutionality of unwritten practices of juvenile institutions administered by Texas Youth Council, and a single District Judge properly exercised jurisdiction. Morales v. Turman, p. 322.

JURY TRIALS. See **Constitutional Law**, VIII.

JUSTICIABILITY. See also **Standing to Sue**

Constitutional challenge—Act distributing federal funds to Indians.—Plenary power of Congress in matters of Indian affairs does not mean that an equal protection challenge to Act providing for distribution of federal funds to Indians pursuant to award by Indian Claims Commission to redress a breach by United States of treaty with tribe, is not justiciable. Appropriate standard of judicial review is that legislative judgment should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Delaware Tribal Business Comm. v. Weeks, p. 73.

JUVENILE DELINQUENCY. See **Constitutional Law**, VII, 2.

JUVENILE INSTITUTIONS. See **Jurisdiction**, 2.

"KEY MAN" GRAND JURY SELECTION SYSTEM. See **Constitutional Law**, V, 4.

KINGS COUNTY, N. Y. See **Voting Rights Act of 1965.**

LABELING REQUIREMENTS FOR COMMODITIES. See **Federal-State Relations**, 4, 5.

LABOR.

Severance pay dispute—Arbitrability under expired collective-bargaining agreement.—Respondent union's claim for severance pay against petitioner employer under collective-bargaining agreement is subject to resolution under agreement's arbitration clause even though dispute over severance pay arose after termination of agreement. Nolde Brothers, Inc. v. Bakery Workers, p. 243.

LABOR UNIONS. See **Federal-State Relations**, 3; **Labor; Procedure.**

LAW LIBRARIES FOR PRISONERS. See **Constitutional Law**, I.

LEGAL ASSISTANCE FOR PRISONERS. See **Constitutional Law**, I.

LEGISLATIVE REAPPORTIONMENT PLANS. See **Voting Rights Act of 1965.**

LIBERTY RIGHTS. See **Constitutional Law**, III, 1.

LICENSE PLATES. See **Constitutional Law**, VII, 1; **Federal-State Relations**, 1.

LIFE INSURANCE COMPANIES. See **Internal Revenue Code.**

LIVE CONTROVERSY. See **Standing to Sue.**

"LIVE FREE OR DIE." See **Constitutional Law**, VII, 1; **Federal-State Relations**, 1.

MAIL-ORDER BUSINESS. See **Constitutional Law**, II, 2; III, 4.

MAJOR CRIMES ACT. See **Constitutional Law**, V, 6.

MANIPULATION OR DECEPTION IN SECURITIES TRANSACTIONS. See **Securities Exchange Act of 1934**, 2–4.

MEAT PACKAGING REQUIREMENTS. See **Federal-State Relations**, 5.

MERGERS. See **Securities Exchange Act of 1934**, 2–4.

MEXICAN-AMERICANS. See **Constitutional Law**, V, 4.

MINORITY STOCKHOLDERS. See **Securities Exchange Act of 1934**, 2–4.

MISSISSIPPI. See **Constitutional Law**, II, 1.

MISTRIALS. See **Constitutional Law**, VI.

MOTOR CARRIERS. See **Constitutional Law**, II, 1.

MURDER. See **Constitutional Law**, III, 2; V, 6.

MURDER ON INDIAN RESERVATION. See **Constitutional Law**, V, 6.

NATIONAL GUARD. See **Army and Air Force Vitalization and Retirement Equalization Act of 1948.**

NATIONAL LABOR RELATIONS ACT. See **Federal-State Relations**, 3; **Procedure.**

NATURAL FATHERS. See **Constitutional Law**, V, 1.

NET-WEIGHT LABELING OF COMMODITIES. See **Federal-State Relations**, 4, 5.

NEW HAMPSHIRE. See **Constitutional Law**, VII, 1; **Federal-State Relations**, 1.

NEW JERSEY. See **Federal-State Relations, 6.**

NEWS MEDIA. See **Constitutional Law, VII, 2.**

NEW YORK. See **Constitutional Law, V, 9; Federal-State Relations, 2; Standing to Sue; Voting Rights Act of 1965.**

NEXUS BETWEEN STATE AND OUT-OF-STATE SELLERS. See **Constitutional Law, II, 2; III, 4.**

NOTICE AND HEARING PRIOR TO CORPORAL PUNISHMENT. See **Constitutional Law, III, 1.**

OBSCENITY. See **Constitutional Law, III, 3.**

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970. See **Constitutional Law, VIII.**

OLD-AGE BENEFITS. See **Constitutional Law, V, 7, 8.**

ONE-PERSON, ONE-VOTE PRINCIPLE. See **Constitutional Law, V, 9.**

OUT-OF-STATE SELLERS. See **Constitutional Law, II, 2; III, 4.**

OVERCROWDING IN PRISONS. See **Jurisdiction, 1.**

PACKAGING REQUIREMENTS FOR COMMODITIES. See **Federal-State Relations, 4, 5.**

PENALTIES. See **Constitutional Law, VIII.**

POLLUTION. See **Federal Water Pollution Control Act.**

PORNOGRAPHY. See **Constitutional Law, III, 3.**

POST-CONVICTION REMEDIES. See **Constitutional Law, X; Habeas Corpus, 1.**

PRE-EMPTION. See **Federal-State Relations, 3–6.**

PREFERENTIAL IMMIGRATION STATUS. See **Constitutional Law, V, 1.**

PREMIUM RESERVES. See **Internal Revenue Code.**

PRESENTENCE INVESTIGATION REPORTS. See **Constitutional Law, III, 2.**

PRESUMPTIONS FAVORING ARBITRABILITY OF LABOR DISPUTE. See **Labor.**

PRETRIAL ORDERS. See **Constitutional Law, VII, 2.**

PRIMA FACIE GRAND JURY DISCRIMINATION. See **Constitutional Law, V, 4.**

PRISONERS. See **Constitutional Law, I; X; Habeas Corpus, 1.**

PRISONERS' RIGHT OF ACCESS TO COURTS. See **Constitutional Law, I.**

PRISONS. See **Jurisdiction, 1.**

PRIVILEGE OF WRIT OF HABEAS CORPUS. See **Constitutional Law, X.**

PRIVILEGE TAXES. See **Constitutional Law, II, 1.**

PROCEDURE.

Labor union member's tort action against union—Damages for employment discrimination—Improper verdict.—It is clear from record that trial of labor union member's claim against union and union officials for intentional infliction of emotional distress did not meet standards required for state court to exercise jurisdiction over claim, since evidence supporting verdict for plaintiff focuses less on defendants' alleged "outrageous conduct" complained of than on employment discrimination allegedly occurring in hiring hall; hence consequent risk that verdict represented damages for employment discrimination rather than for instances of intentional infliction of emotional distress precludes reinstatement of trial court's judgment. Farmer v. Carpenters, p. 290.

PUBLICATION OF JUVENILE DELINQUENT'S NAME OR PHOTOGRAPH. See **Constitutional Law, VII, 2.**

PUBLIC SCHOOLS. See **Constitutional Law, III, 1; IV.**

PURPOSEFUL GRAND JURY DISCRIMINATION. See **Constitutional Law, V, 4.**

RACIAL DISCRIMINATION. See **Constitutional Law, V, 6; Voting Rights Act of 1965.**

RACIAL QUOTAS IN REAPPORTIONING VOTING DISTRICTS. See **Voting Rights Act of 1965.**

REAPPORTIONMENT PLANS. See **Voting Rights Act of 1965.**

REBUTTAL OF PRESUMPTIONS. See **Constitutional Law, V, 4.**

REFERENDUMS. See **Constitutional Law, V, 9.**

REFUSAL TO REOPEN CLAIM FOR SOCIAL SECURITY BENEFITS. See **Administrative Procedure Act; Social Security Act.**

REGULATION OF COMMODITY PACKAGING. See **Federal-State Relations, 4, 5.**

REINSURANCE AGREEMENTS OR TREATIES. See **Internal Revenue Code.**

REMAND OF REMOVED ACTION TO STATE COURT. See **Removal.**

REMOVAL.

Remand to state court—Reviewability.—District Court's order remanding a removed diversity tort action to state courts for apparent lack of complete diversity among parties was clearly within 28 U. S. C. § 1447 (c), which provides for remanding a removed action when district court determines that "case was removed improvidently and without jurisdiction," and hence, under § 1447 (d), was not reviewable by Court of Appeals. Gravitt v. Southwestern Bell Tel. Co., p. 723.

REQUIREMENTS FOR THREE-JUDGE COURT JURISDICTION. See **Jurisdiction.**

RESERVES. See **Army and Air Force Vitalization and Retirement Equalization Act of 1948.**

RETIREMENT BENEFITS UNDER SOCIAL SECURITY ACT. See **Constitutional Law, V, 7, 8.**

RETIREMENT PAY FOR RESERVES OR NATIONAL GUARD. See **Army and Air Force Vitalization and Retirement Equalization Act of 1948.**

RETROACTIVITY OF NEW OBSCENITY STANDARDS. See **Constitutional Law, III, 3.**

RETROACTIVITY OF STATUTORY AMENDMENT. See **Constitutional Law, V, 7, 8.**

RIGHT OF ACCESS TO COURTS. See **Constitutional Law, I.**

RIGHTS UNDER EXPIRED COLLECTIVE-BARGAINING AGREEMENT. See **Labor.**

RIGHT TO COUNSEL. See **Constitutional Law, IX; Habeas Corpus, 2.**

RIGHT TO JURY TRIAL. See **Constitutional Law, VIII.**

RIGHT TO LIBERTY. See **Constitutional Law, III, 1.**

RIGHT TO VOTE. See **Voting Rights Act of 1965.**

ROSEBUD SIOUX RESERVATION. See **Indians.**

RULES OF CRIMINAL PROCEDURE. See **Constitutional Law, VI.**

SAFETY STANDARDS. See **Constitutional Law, VIII.**

SATISFACTION OF JUDGMENTS. See **Standing to Sue.**

SCHOOLS. See **Constitutional Law, III, 1; IV.**

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Administrative Procedure Act; Social Security Act.**

SECURITIES EXCHANGE ACT OF 1934.

1. *Damages under § 14 (e) of Act—Tender offeror—Standing to sue.*—A tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under § 14 (e) of Act; hence, Court of Appeals erred in holding that respondent Chris-Craft Industries, as defeated tender offeror in a contest for control of a corporation, had an implied cause of action for damages under that provision. Piper v. Chris-Craft Industries, p. 1.

2. *Parent company and subsidiary—Allowable merger.*—Merger of petitioner parent company with 95%-controlled subsidiary pursuant to Delaware "short-form merger" statute, if carried out as alleged in respondent minority shareholders' complaint, was neither deceptive nor manipulative and therefore did not violate § 10 (b) of Act or Rule 10b–5 issued thereunder. Minority shareholders were furnished with all relevant information with which to decide whether to accept price offered for their stock or reject it and seek an appraisal in Delaware court, and cases relied on by respondents and Court of Appeals in which breaches of fiduciary duty were held violative of Rule 10b–5, all of which included some element of deception, are inappropriate here where there was none. Santa Fe Industries, Inc. v. Green, p. 462.

3. *§ 10 (b) or Rule 10b–5—Conduct covered.*—Only conduct involving manipulation or deception is reached by § 10 (b) of Act or Rule 10b–5 issued thereunder. "When a statute speaks so specifically in terms of manipulation and deception, . . . and when its history reflects no more expansive intent, [the Court is] quite unwilling to extend the scope of the statute . . . ." Santa Fe Industries, Inc. v. Green, p. 462.

4. *Securities and Exchange Commission Rule 10b–5—Conduct regulated—Interference with state regulation.*—A holding that complaint by respondent minority stockholders objecting to merger of petitioner parent company with subsidiary alleged fraud under Rule 10b–5 would bring within Rule a wide variety of corporate conduct traditionally left to state regulation. Absent a clear indication of congressional intent, Court should be reluctant to federalize substantial portion of law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. Santa Fe Industries, Inc. v. Green, p. 462.

5. *Violations of § 14 (e) and Rule 10b–6—Tender offeror—Right to injunctive relief.*—Court of Appeals erred under circumstances presented here in awarding injunctive relief to respondent Chris-Craft Industries, who, as defeated tender offeror in contest for control of a corporation, brought action alleging violations of § 14 (e) of Act and Securities and Exchange Commission Rule 10b–6. Case was tried in District Court exclusively as a suit for damages after Chris-Craft expressly waived any claim

SECURITIES EXCHANGE ACT OF 1934—Continued.

to injunctive relief. Under these circumstances, this Court's holding that Chris-Craft has no cause of action for damages under either § 14 (e) or Rule 10b–6 renders injunction granted by District Court inappropriate, premised as it was upon impermissible award of damages. Piper v. Chris-Craft Industries, p. 1.

6. *Violations of Rule 10b–6—Tender offeror—Standing to sue.*—In context of this case, respondent Chris-Craft Industries, as defeated tender offeror in contest for control of a corporation, has no standing to sue for damages on account of asserted Securities and Exchange Commission Rule 10b–6 violations by successful competitor, since Chris-Craft's complaint is not that price paid for target company's shares was influenced by Rule 10b–6 violations, but that opportunity to gain control of target company was lost by virtue of those violations. Thus, Chris-Craft's complaint does not implicate concerns of Rule 10b–6, which is aimed at maintaining an orderly market for distribution of securities free from manipulative influences. Piper v. Chris-Craft Industries, p. 1.

SELECTION OF GRAND JURIES. See **Constitutional Law**, V, 4.

SENTENCES. See **Constitutional Law**, III, 2.

SEPARATE VOTER APPROVAL REQUIREMENTS FOR COUNTY CHARTERS. See **Constitutional Law**, V, 9.

SEVENTH AMENDMENT. See **Constitutional Law**, VIII.

SEVERANCE PAY. See **Labor.**

SEX DISCRIMINATION. See **Constitutional Law**, V, 3, 7, 8.

SHORT-FORM MERGERS. See **Securities Exchange Act of 1934**, 2–4.

SIXTH AMENDMENT. See **Constitutional Law**, IX; **Habeas Corpus**, 2.

SOCIAL SECURITY ACT. See also **Administrative Procedure Act**; **Constitutional Law**, V, 3, 7, 8.

Judicial review—Decision not to reopen claim for social security benefits.—Section 205 (g) of Act, which provides that any individual, after any "final decision of the Secretary made after a hearing" to which he was a party, irrespective of amount in controversy, may obtain a review of such decision by civil action commenced within 60 days, does not authorize review of decision of Secretary of Health, Education, and Welfare not to reopen a previously adjudicated claim for social security benefits. Califano v. Sanders, p. 99.

SOUTH DAKOTA. See **Indians.**

SPECIAL PREFERENCE IMMIGRATION STATUS. See **Constitutional Law, V, 1.**

STANDARDS FOR DETERMINING HARD-CORE PORNOGRAPHY. See **Constitutional Law, III, 3.**

STANDING TO SUE. See also **Securities Exchange Act of 1934, 1, 5, 6.**

Injunctive relief against state contempt procedures.—Only those appellee judgment debtors who have not yet been fined and imprisoned for contempt for disobeying subpoenas to appear in supplemental proceedings brought to collect judgments but who allegedly were threatened with imprisonment, have standing to seek injunctive relief against New York contempt procedures on federal constitutional grounds, since such appellees are subject to pending proceedings in state courts. Other appellee judgment debtors, who were similarly adjudged in contempt but had paid their fines and were released from jail by time action was filed, have no standing, absent any allegation or finding that they were threatened with further proceedings, since they no longer have a live controversy with appellant judges or other state officials as to either contempt citations or short periods of incarceration that would entitle them to injunctive relief. Juidice v. Vail, p. 327.

STATE MOTTOES. See **Constitutional Law, VII, 1; Federal-State Relations, 1.**

STATE PRISONERS' RIGHT OF ACCESS TO COURTS. See **Constitutional Law, I.**

STATE PRISONS. See **Jurisdiction, 1.**

STATE REGULATION OF COMMODITY PACKAGING. See **Federal-State Relations, 4, 5.**

STATE REGULATION OF CORPORATIONS. See **Securities Exchange Act of 1934, 2–4.**

STATE REGULATION OF WASTE DISPOSAL. See **Federal-State Relations, 6.**

STATE TAXES ON PRIVILEGE OF DOING BUSINESS IN STATE. See **Constitutional Law, II, 1.**

STATE USE TAXES. See **Constitutional Law, II, 2; III, 4.**

SUBJECT-MATTER JURISDICTION. See **Administrative Procedure Act.**

SUBPOENAS. See **Federal-State Relations, 2; Standing to Sue.**

SUPERIOR COURT OF DISTRICT OF COLUMBIA. See **Habeas Corpus, 1.**

SUPREME COURT.

1. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, p. 911.
2. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Eighth Circuit, p. 988.
3. Presentation of Solicitor General, p. v.

SURVIVORS' SOCIAL SECURITY BENEFITS. See **Constitutional Law**, V, 3.

SUSPENSION OF PRIVILEGE OF WRIT OF HABEAS CORPUS. See **Constitutional Law**, X.

TAKEOVER CONTESTS. See **Securities Exchange Act of 1934**, 1, 5, 6.

TAXES. See **Constitutional Law**, II, 1, 2; III, 4; **Internal Revenue Code.**

TAXES ON PRIVILEGE OF DOING BUSINESS IN STATE. See **Constitutional Law**, II, 1.

TENDER OFFERORS. See **Securities Exchange Act of 1934**, 1, 5, 6.

TERMINATION OF COLLECTIVE-BARGAINING AGREEMENT. See **Labor.**

TEXAS. See **Constitutional Law**, V, 4.

THREE-JUDGE COURTS. See **Jurisdiction.**

TORTS. See **Federal-State Relations**, 3; **Procedure.**

TREATIES WITH INDIANS. See **Constitutional Law**, V, 2; **Indians; Justiciability.**

TRIALS. See **Procedure.**

UNDERREPRESENTATION OF IDENTIFIABLE GROUP ON GRAND JURIES. See **Constitutional Law**, V, 4.

UNEARNED PREMIUM RESERVES. See **Internal Revenue Code.**

UNIONS. See **Federal-State Relations**, 3; **Labor; Procedure.**

UNSAFE WORKING CONDITIONS. See **Constitutional Law**, VIII.

USE TAXES. See **Constitutional Law**, II, 2; III, 4.

VARIANCES FROM COMPLIANCE WITH WATER POLLUTION REGULATIONS. See **Federal Water Pollution Control Act.**

VIOLATIONS OF SAFETY STANDARDS. See **Constitutional Law**, VIII.

VOTER APPROVAL REQUIREMENTS FOR COUNTY CHARTERS. See **Constitutional Law**, V, 9.

VOTING RIGHTS ACT OF 1965.

Reapportionment plan—Use of racial criteria.—Court of Appeals' judgment holding that New York's use of racial criteria in its 1974 legislative reapportionment plan for Kings County in attempting to comply with § 5 of Act and to secure Attorney General's approval of plan under Act did not violate Fourteenth or Fifteenth Amendment, is affirmed. United Jewish Organizations v. Carey, p. 144.

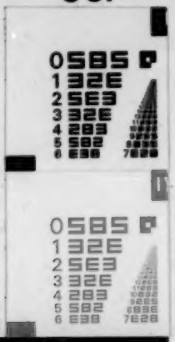
WAIVER OF RIGHT TO COUNSEL. See **Constitutional Law**, IX.

WASTE DISPOSAL. See **Federal-State Relations**, 6.

WATER POLLUTION. See **Federal Water Pollution Control Act.**

WEIGHT-LABELING STANDARDS FOR COMMODITIES. See **Federal-State Relations**, 4, 5.

WHOLESOME MEAT ACT. See **Federal-State Relations**, 5.

WIDOWERS' SOCIAL SECURITY BENEFITS. See **Constitutional Law**, V, 3.

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